

CONTRACT NO. \_\_\_\_\_

CONTRACT FOR [project] FOR THE DEPARTMENT OF [department]?  
FEDERAL AID PROJECT NO. [project #]

Source of Funds:

Certification Requested from County:

THIS CONTRACT is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the COUNTY OF MAUI, a political subdivision of the State of Hawaii, whose business address is 200 South High Street, Wailuku, Maui, Hawaii 96793, hereinafter referred to as the "County", and [contractor], a [state] corporation, whose business address is [address], hereinafter referred to as the "Contractor", collectively referred to as the "Parties".

R E C I T A L S:

WHEREAS, the County desires to retain and engage the Contractor to provide the services described in this Contract and its attachments, and the Contractor desires to render such services for, and on behalf of, the County; and

WHEREAS, the Contract is for construction as defined in section 103D-104, Hawaii Revised Statutes ("HRS"); and

WHEREAS, pursuant to section 46-1.5(4), HRS, the County is authorized to enter into this Contract.

A G R E E M E N T:

NOW, THEREFORE, In consideration of the following mutual promises and agreements set forth, the Parties agree as follows:

1. Scope of Work. The Contractor shall supply, furnish,

and pay for all labor, transportation, materials, tools, and equipment necessary to construct, in place complete, all work as shown and called for in the document entitled "[specifications]", Addendum No. [if any], construction plans, and in accordance with the Proposal of the Contractor dated [date] ("Contract Specifications"), which documents are on file in the office of the Procurement Officer, and are hereby incorporated by reference in this Contract.

2. Term of Contract. The Contractor agrees to complete and perform this Contract within [number] (?) [calendar, work] days after a written Notice to Proceed has been issued.

3. Compensation. The Contractor shall be compensated for services rendered and costs incurred under this Contract for a total amount not to exceed [amount] AND NO/100 DOLLARS (\$?.00) inclusive of all taxes, and in accordance with the Proposal of the Contractor.

4. Liquidated Damages. The Contractor recognizes and agrees that time is of the essence under this Contract and, due to the speculative character and difficulty of ascertaining damages to the County of Maui resulting from any delay beyond the date set herein for completion, the Parties hereto, for the purpose of putting the question of damages beyond controversy and dispute, hereby agree that the Contractor shall pay to the County the sum set forth in the Contract Specifications, as liquidated damages, and not as a penalty, for each and every work day that work or any portion of work contemplated under

this Contract remains uncompleted beyond the time set herein for completion; provided, however, that the remedy of liquidated damages shall be in addition to any other rights and remedies otherwise available to the County of Maui and not expressly waived herein.

The Contractor agrees that the aforesaid sum is a reasonable estimate of, and reasonably proportionate to, the damages which will probably be sustained by the County as a result of any delay.

5. General Terms and Conditions. The Contractor shall comply with the General Terms and Conditions of this Contract which are attached hereto as Exhibit "A" and made a part hereof.

6. Officer-in-Charge. The Director of [department], or an authorized representative, shall be the Officer-in-Charge for all services provided herein.

IN WITNESS WHEREOF, the County has caused this Contract to be executed on its behalf by its Procurement Officer, and the Contractor has executed the same on the day and year first above written.

COUNTY OF MAUI

By \_\_\_\_\_  
KALBERT K. YOUNG, DIRECTOR  
Department of Finance

(Corporate seal)

CONTRACTOR:

[contractor]

APPROVAL RECOMMENDED:

By \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
[director]  
Director of  
[department]

\_\_\_\_\_  
(Print Name)

Its \_\_\_\_\_  
(Title)

APPROVED AS TO FORM  
AND LEGALITY:

\_\_\_\_\_  
TRACI FUJITA VILLAROSA  
First Deputy Corporation Counsel  
County of Maui  
C:\Documents and Settings\cbbar\Desktop\greg\federal construction.wpd

On this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_, before me appeared KALBERT K. YOUNG, to me personally known, who being by me duly sworn did say that he is the Director of Finance of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed on behalf of said County of Maui pursuant to Section 9-18 of the Charter of the County of Maui; and the said KALBERT K. YOUNG acknowledged the said instrument to be the free act and deed of said County of Maui.

Notary Public, State of Hawaii

[illegible]

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Notary Public, State of Hawaii

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## **EXHIBIT "A"**

### **COUNTY OF MAUI GENERAL TERMS AND CONDITIONS CONSTRUCTION CONTRACTS**

#### **Preface**

Section numbers of the Hawaii Revised Statutes are referenced at the end of some paragraphs in brackets. The purpose for the inclusion of such references is to indicate that the paragraphs are derived from Hawaii Revised Statutes. The language of the statutes has been retained for the most part, but in some instances the statutes may have been reworded. All Parties should review the referenced statutes.

In the event of a conflict between contract terms, any special provisions shall control first; technical specifications or construction plans second; State of Hawaii, Department of Transportation, Highway Division Standard Specifications & Special Provisions, if applicable, third; and these General Terms and Conditions last.

## Section 1 - Definitions

When used in these General Terms and Conditions or elsewhere in the Contract, the following terms, or pronouns used in place of them, shall have the meaning ascribed to them in this section, unless it is apparent from the context that a different meaning is intended:

**1.01 "Addendum (plural-Addenda)"** means a written or graphic document, including drawings and specifications, issued by the Procurement Officer during the bidding period which modifies or interprets the bidding documents by additions, deletions, clarifications, or corrections which document shall be considered and made a part of the contract when executed.

**1.02 "Bid Documents"** mean the composition of the notice to bidders, instructions to bidders, bid proposal form, general terms and conditions, special provisions, construction plans, specifications, and all addenda issued prior to opening of bids.

**1.03 "Calendar Day"** means any day shown on the calendar, beginning at midnight and ending at midnight of the following day. If no designation of calendar or working day is made, "day" shall mean calendar day.

**1.04 "Contract Documents"** mean the composition of general terms and conditions, special provisions, construction plans, specifications, addenda, Contractor's bid proposal, notice of award, executed contract, contract amendments, Contractor's performance and payment bonds, Notice to Proceed, and change orders.

**1.05 "Contract Time"** means the number of calendar days or working days provided in the contract for the completion of the work. The contract time shall commence on the effective date of the Notice to Proceed.

**1.06 "County"** means the County of Maui.

**1.07 "Equipment"** means all machinery, tools, and apparatus necessary to complete the work under the contract.

**1.08 "HAR"** means Hawaii Administrative Rules, as amended.

**1.09 "HRS"** means Hawaii Revised Statutes, as amended.

**1.10 "Inspector"** means the County's authorized representative assigned to make detailed inspections of contract performance, prescribed work, and materials supplied.

**1.11 "Liquidated Damages"** mean the amount set forth in the

contract to be paid by the Contractor to the County for each and every day the work remains uncompleted beyond the contract time.

**1.12 "Lowest Responsive, Responsible Bidder"** means the bidder who has the capability in all respects to perform fully the contract requirements, the integrity and reliability which will assure good faith performance and who has submitted the lowest bid which conforms in all material respects to the invitation for bids.

**1.13 "Notice to Bidders"** means the public advertisement inviting bids for the work contemplated. Such advertisement indicates the location of the work to be done and/or the character of the material to be furnished and the time and place for opening of bids.

**1.14 "Notice to Proceed"** means the written notice given by the Officer-in-Charge to the Contractor establishing the date on which the contract time will commence.

**1.15 "Payment Bond"** means the security executed by the Contractor and the Contractor's sureties and furnished to the County to guarantee payment by the Contractor to laborers, materials suppliers, and subcontractors according to the terms of the contract.

**1.16 "Performance Bond"** means the security executed by the Contractor and the Contractor's securities and furnished to the County to guarantee the completion of the work according to the terms of the contract.

**1.17 "Plans or Drawings"** means any and all designs, plans, construction drawings, specifications, cost estimates, work schedules, proposals, studies, reports, notes, tables, notations and other similar items which show the location, character, dimension, and details of the work to be completed under the contract, including the current and applicable portions of the *Water System Standards 2002, as amended*, for Department of Water Supply contracts.

**1.18 "Procurement Officer"** means the Director of the Department of Finance of the County of Maui, acting directly or through the Director's duly authorized representative.

**1.19 "Shop Drawings"** mean the drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by the Contractor and submitted by the Contractor to illustrate some portion of the work.

**1.20 "Special Provisions"** are the means by which the

general terms and conditions are amended.

**1.21 "State"** means the State of Hawaii.

**1.22 "Surety"** means the qualified individual or entity, other than the Contractor, that insures the Contractor's acceptable performance of the contract.

**1.23 "Total Sum Bid"** means the total bid price submitted by the bidder for performing all work in accordance with the contract.

**1.24 "Work"** means the furnishing of all labor, materials, equipment, and other incidentals necessary or convenient for the successful completion of the construction project and the execution of all duties and obligations imposed by the contract on the Contractor.

**1.25 "Working Day"** means a calendar day in which the Contractor is capable of working four (4) or more hours with its normal work force, exclusive of:

- (1) Saturdays, Sundays, and State/County recognized legal holidays;
- (2) Days in which work is suspended by the County for four (4) or more hours through no fault of the Contractor; and
- (3) Days prevented by or resulting from inclement weather to permit the normal work force to proceed with construction operations for at least four (4) hours. Also, the Contractor shall be performing the current controlling item or items of work.

## **Section 2 - Bidding Instructions**

**2.01 Obtaining Bid Documents.** Bidders shall refer to the notice to bidders for instructions in obtaining bid documents.

**2.02 Proposal Forms.** The County will furnish prospective bidders with proposal forms. Papers bound with or attached to the proposal form are part of the proposal. The bidder shall not detach or alter these papers when submitting its bid. The bidder shall also consider other documents, including the plans and specifications, a part of the proposal form whether attached or not.

**2.03 Contractor's License Required.** All bidders and all their subcontractors shall be licensed in accordance with

chapter 444, HRS, and as required in the notice to bidders. It is the sole responsibility of the bidder to review the requirements of the project and determine the appropriate licenses that are required to complete the project.

**2.04 Qualification of Bidders.** (a) The Procurement Officer shall determine whether the prospective bidder has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the Procurement Officer, in the Procurement Officer's discretion, may require any prospective bidder to submit answers, under oath, to questions contained in a standard form of questionnaire. Whenever it appears from the answers to the questionnaire or otherwise, that the prospective bidder is not fully qualified and able to perform the work, a written determination of non-responsibility of a bidder shall be made by the Procurement Officer. The reasonable failure of a bidder to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder. The decision of the Procurement Officer shall be final unless the bidder applies for administrative review pursuant to section 103D-709, HRS. [§103D-310, HRS]

(b) Questionnaires, when required by the Procurement Officer, shall be submitted not less than forty-eight (48) hours prior to the time designated for opening of bids.

(c) All bidders shall be incorporated or organized under the laws of the State of Hawaii, or be registered to do business in the State as a separate branch or division that is capable of fully performing under the contract. The bidder shall be in compliance with all laws governing entities doing business in the State. [§103D-310, HRS]

**2.05 Preparation of Bids.** (a) Bids shall be submitted on the proposal form furnished by the County. The bidder shall complete the proposal using words and figures, which shall be in ink or typed. If a discrepancy occurs between the prices written in words and the those written in figures, the prices written in words shall govern.

(b) Bids must be signed in ink by a duly authorized representative of the bidder on the spaces provided for signatures. All signatures must be acknowledge by a notary public.

(c) If the bidder is a corporation, the title or titles of the person or persons signing must be stated and the corporate seal affixed thereto. If the corporation does not have a corporate seal, it should be indicated in the form of

acknowledgment attached thereto. A copy of a resolution of the Board of Directors of the corporation, or other written evidence of authority signed by an officer of the corporation, authorizing the person or persons to execute bids, contracts, and other necessary documents in connection therewith shall be attached.

(d) Where the bidder is an association or group, the title or titles of the person or persons signing must be stated and an affidavit which acknowledges the authority of the signer or signers to sign bids and all other necessary documents in connection therewith for the association or group must be attached.

(e) Bids must be submitted in a sealed envelope, bearing on the outside the identity of the project and the bidder's name and address. Bids will be received only at the office designated in the notice to bidders. All bid envelopes will be stamped with the time and date received by the County. The County will reject and return a bid unopened if received after the time set for opening of bids.

**2.06 Listing of Joint and Subcontractors.** (a) The names of each person or entity to be engaged by the bidder as a joint Contractor or subcontractor and the nature and scope of work to be performed by each shall be submitted with the bidder's proposal. Bids that do not comply with this requirement may be accepted if acceptance is in the best interest of the County and the value of work to be performed by the joint Contractor or subcontractor is equal to or less than one percent (1%) of the total bid amount. [§103D-302, HRS]

(b) If no joint Contractor or subcontractor is to be engaged the bidder must complete the form by writing "NONE." If left blank, the County will interpret the blank as no joint Contractor or subcontractor will be used.

**2.07 Examination of the Bid Documents and Project Site, and Conducting Investigations.** (a) Before submitting a bid, bidders shall examine the bid documents and the project site, make inquiries at the appropriate offices of the County, State, and Federal governments, and the offices of persons and entities owning, controlling, or operating underground improvements, and conduct investigations to satisfy themselves as to the conditions to be encountered and to determine the correctness of the information contained in the bid documents.

(b) The submission of a bid shall be considered verification that the bidder:

- (1) Has made such examinations and inquiries;

- (2) Is satisfied with the conditions to be encountered in performing the work;
- (3) Acknowledges and understands the terms and conditions contained in the bid documents; and
- (4) Agrees to abide by such terms and conditions if awarded the contract.

**2.08 Subsurface Investigations.** (a) If the County has conducted subsurface investigations, bidders may inspect the data obtained from such investigations and examine samples, if available.

(b) Any subsurface information made available are for the bidders' convenience only. The information may have been obtained at specific locations, and no assurance is given that these conditions are necessarily typical of conditions at other locations. In addition, no assurance is given that conditions found at the time of the subsurface explorations, such as the presence or absence of water, will be the conditions that will prevail at the time of construction. The bidder shall be responsible for all assumptions, deductions, or conclusions made or derived from the subsurface information made available.

(c) Making available to bidders information from the subsurface explorations is not to be construed as a waiver of subsection 2.07 - Examination of Bid Documents and Project Site, and Conducting of Investigations.

**2.09 Pre-bid Conferences.** At least fifteen days prior to submission of bids pursuant to an invitation for bids (§ 103D-302) for a construction or design-build project with a total estimated contract value of \$500,000 or more, and at least fifteen days prior to submission of proposals pursuant to a request for proposals (§ 103D-303) for a construction or design-build project with a total estimated contract value of \$100,000 or more, the head of the purchasing agency shall hold a pre-bid conference and shall invite all potential interested bidders, offerors, subcontractors, and union representatives to attend. The County may, for projects that have special or unusual requirements, [e.g., requiring physical inspection,] make attendance at a pre-bid conference a condition for submitting a bid. Pre-bid conferences shall be announced to all prospective bidders in the notice to bidders. Nothing stated at the pre-bid conference shall change the solicitation unless a change is made by written addendum as provided in subsection 2.11 - Addenda.

**2.10 Clarification of Bid Documents.** (a) If it appears to a bidder that the performance of the work or any matter relating thereto is not sufficiently described or explained in the bid



documents, or that a discrepancy exists between different parts thereof, or that the full intent of the bid documents is not clear, the bidder shall submit a written request to the Procurement Officer for clarification not less than ten (10) calendar days prior to the day designated for opening of bids.

(b) The written request may be faxed pursuant to subsection 2.19 - Use of Facsimiles.

(c) If the Procurement Officer deems that a clarification is in order, it shall be issued in the form of an addendum.

**2.11 Addenda.** (a) Any addendum issued prior to the opening of bids shall be binding upon the bidder and shall be made a part of the contract.

(b) No addendum will be issued during the 5 days immediately preceding the day designated for the opening of bids, unless the purpose of the addendum is to postpone the date of bid opening.

(c) Failure by the bidder to receive any addendum shall not relieve the bidder from any obligation under its bid as submitted.

(d) No oral interpretation, instruction, or information regarding the bid documents given by any officer or employee of the County shall be binding.

**2.12 Determination of Intended Bid.** (a) If the proposal form contains a list of unit price or lump sum items, or both, they do not necessarily describe all of the work involved in the performance of the contract, but merely indicate that the compensation for the performance of the contract will be based upon and limited to such items. If a bidder is in doubt as to the proper bid item to which the anticipated cost of any incidental item is to be allocated, the bidder shall include such cost in the bid item which the bidder deems most appropriate.

(b) If the proposal calls for unit price items, and the bidder's unit price bid multiplied by the number of units in any item is not equal to the total amount bid for that item, it will be assumed that the unit price bid represents the bidder's intention and an error was made in the multiplication. The Procurement Officer will correct the total amount bid for the item and total sum bid of the bidder's proposal.

(c) If the figure obtained by adding the individual bid items listed in the proposal does not equal to the total figure written in the proposal, it will be assumed that an error was

made in the addition and the Procurement Officer will correct the total sum bid.

(d) The bid price shall include all applicable taxes, including the State of Hawaii General Excise Tax, and shall include delivery charges F.O.B. job site.

(e) The bid price shall be firm for a minimum of sixty (60) days from the bid opening date to allow for contract execution.

**2.13 Disqualification of Bids.** The County may disqualify a bidder and reject its bid for reasons including but not limited to:

(a) The bidder is non-responsible;

(b) The bid is not responsive;

(c) The bid does not include a listing of subcontractors and joint Contractors or contains only a partial or incomplete listing;

(d) The bid is unsigned or is not signed by an authorized representative of the bidder;

(e) Evidence indicating that unit price or lump sum price items are unbalanced in a bid;

(f) Evidence indicating that bidders are in collusion;

(g) Submission of more than one bid whether under the same name or a different name. Without limiting the generality of the foregoing, a bidder shall be considered to have submitted more than one bid if the bidder submits more than one bid under the bidder's name, through bidder's agents, through joint ventures, partnerships, or corporations or which the bidder has more than twenty-five percent (25%) ownership in each of them, or through any combination of any of them;

(h) The bidder is suspended under chapter 104 or chapter 444, HRS;

(i) The bid is not accompanied by an acceptable form of bid security, or the bid security is in an amount less than five percent (5%) of the amount of the base bid, including additives;

(j) The bidder fails to submit a valid and timely certificate of good standing from the Department of Commerce and Consumer Affairs Business Registration Division and/or the bidder fails to submit a valid and timely certificate of

compliance from the Department of Labor and Industrial Relations.

(k) The bidder failed to submit the standard form of questionnaire or failed to submit said questionnaire within the due time, when required by the County; or

(l) Evidence of assistance from a person who has been an employee of the County within the preceding two years and who participated while in County office or employment in the matter with which the contract is directly concerned, pursuant to section 84-15, HRS.

**2.14 Bid Security.** (a) The County will not consider a bid proposal unless accompanied by bid security in an amount not less than five percent (5%) of the amount bid. [§103D-323, HRS]

(b) Acceptable bid security shall be limited to the following:

- (1) Surety bond underwritten by a company licensed to issue bonds in the State of Hawaii, which shall be substantially in the form provided in the project specifications;
- (2) Legal tender;
- (3) A certificate of deposit; credit union share certificate; or cashier's, treasurer's, teller's, or official check drawn by, or a certified check accepted by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, and payable at sight or unconditionally assigned to the County. These instruments may be utilized only to a maximum of \$100,000. If the required security or bond amount totals over \$100,000, more than one instrument not exceeding \$100,000 each and issued by different financial institutions shall be accepted.

(c) The County will return bid security to bidders within ten (10) working days following execution of the contract by all Parties and after the successful bidder furnishes acceptable performance and payment bonds and certificates of insurances.

**2.15 Mandatory Purchase of Hawaii Products.** Bidders are instructed to refer to section 103D-1002, HRS and chapter 3-124, HAR.

**2.16 Substitution of Materials and Equipment.** (a) Bids shall be based on materials and equipment specified in the bid

documents, unless the Procurement Officer approves substitution of material or equipment by addendum.

(b) A bidder may make a written request for a material or equipment substitution for the Procurement Officer's determination. The written request shall be submitted to the Procurement Officer not less than ten (10) calendar days prior to the day designated for opening of bids. The substitution request shall be accompanied by four (4) copies of any pertinent information for the Procurement Officer's determination. If the Procurement Officer is unable to determine the quality and suitability of the substitution based on the information provided by the bidder, the request shall be rejected. The burden of proof as to the comparative quality and suitability of the substitution shall be the bidder's responsibility. The Procurement Officer shall be the sole judge as to the comparative quality and suitability of the substitution, and the Procurement Officer's decision shall be final. If the information provided to the Procurement Officer is determined incomplete or insufficient, whereas the Procurement Officer is unable to determine the quality and suitability of the substitution, the request shall be rejected.

(c) If the Procurement Officer approves a material or equipment substitution, an addendum shall be issued by the Procurement Officer.

(d) Bids based on a material or equipment substitution approved by the Procurement Officer, shall include the additional cost required for all modifications, including the cost of revising the construction plans and technical specifications required to accommodate the approved substitution.

**2.17 Pre-Opening Modification and Withdrawal of Bids.** (a) Bids may be modified prior to the bid submission deadline provided the Procurement Officer receives a written notice stating that a modification to the bid is submitted accompanied by the actual modified bid. The written notice may be faxed pursuant to subsection 2.19 - Use of Facsimiles, provided the bidder submits the actual written notice and actual modified bid prior to the bid submission deadline and within two (2) working days following the faxed notice.

(b) Bids may be withdrawn provided the Procurement Officer receives a written notice stating the bidder's bid is withdrawn prior to the deadline for opening of bids. The written notice may be faxed pursuant to subsection 2.19 - Use of Facsimiles. Bids may not be withdrawn after the bid opening.

**2.18 Public Opening of Bids.** Bids shall be opened publicly

in the presence of one or more witnesses, at the time and place designated in the notice to bidders. The amount of each bid and other relevant information, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection. [§103D-302, HRS]

**2.19 Use of Facsimiles.** Copies of documents transmitted by bidders via facsimile machine shall be limited to the following:

- (a) The request for clarification of bid documents pursuant to subsection 2.10 - Clarification of Bid Documents;
- (b) The request for material or equipment substitution pursuant to subsection 2.16 - Substitution of Materials and Equipment which includes four (4) copies of any pertinent information; and
- (c) The request for modification or withdrawal of bids pursuant to subsection 2.17 - Pre-Opening Modification or Withdrawal of Bids.

Documents will be received by facsimile machine at the number designated by the County. It is the bidder's responsibility to assure the faxed documents are received by the Procurement Officer in a timely manner.

### **Section 3 - Award and Execution of Contract**

**3.1 Award of Contract.** The award of the contract, if it be awarded, will be made by written notice by the Officer-in-Charge to the lowest responsive, responsible bidder. Said notice shall not be construed to be authorization to proceed with the performance of services under the Contract. Any services performed by the Contractor prior to the date indicated in the Notice to Proceed from the Officer-in-Charge shall be at the Contractor's own risk. The contract will be awarded within sixty (60) days after the opening of the bids. If it appears that the contract cannot be awarded within such time, the award may be made after the specified time as mutually agreed upon between the County and the lowest responsive, responsible bidder. The County may cancel the award of the contract at any time before the execution of the contract.

**3.2 Execution of Contract.** Prior to the drafting of the Contract, discussions may be held between the Parties relative to the extent of the services to be performed by the Contractor and other pertinent matters. The Procurement Officer will submit the contract to the Contractor for review and signature. The Contractor shall enter into a contract with the County and

provide sufficient performance and payment bonds and certificates of insurance within ten (10) calendar days after the execution of the contract or within such further time as the County may allow. The contract must be signed in ink by persons duly authorized to enter into contracts with the County. If the Contractor is an individual or partnership, the Contractor shall sign the contract before a notary public. If the Contractor is a corporation, the Contractor shall cause the contract to be signed before a notary public by an officer authorized to do so and shall affix to the contract its corporate seal, together with a certificate, resolution or other instrument vesting such officer with authority to sign the contract on the corporation's behalf. If the Contractor is an association or group, the title or titles of the person or persons signing must be stated and an affidavit which acknowledges the authority of the signer or signers to sign the contract and other necessary documents in connection therewith for the association or group must be attached. The signed contract shall be returned to the Procurement Officer for signature and further processing.

**3.3 Performance and Payment Bonds.** Within ten (10) calendar days after the execution of the contract or within such further time as the County may allow, the Contractor shall submit sufficient performance and payment bonds for the full and faithful performance of the contract in accordance with the terms and intent thereof and also for the prompt payment to all others for all labor and materials furnished by them to the successful bidder and used in the prosecution of the work provided for in the contract. Performance and payment bonds shall be in an amount equal to one hundred percent (100%) of the contract price and shall be limited to:

- (a) Surety bond underwritten by a company licensed to issue bonds in the State of Hawaii, which shall be substantially in the form provided in the project specifications;
- (b) Legal tender; or
- (c) A certificate of deposit; credit union share certificate; or cashier's, treasurer's, teller's, or official check drawn by, or a certified check accepted by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, and payable at sight or unconditionally assigned to the County. These instruments may be utilized only to a maximum of \$100,000. If the required security or bond amount totals over \$100,000, more than one instrument not exceeding \$100,000 each and issued by different financial institutions shall be accepted.

**3.4 Tax Clearance Requirement.** Pursuant to §103D-328, HRS, the Contractor shall submit a tax clearance certificate issued by the Hawaii State Department of Taxation ("DOTAX") and the Internal Revenue Service ("IRS"). The certificate shall be valid for six (6) months from the most recent approval stamp date on the certificate and must be valid on the date it is received by the County. The application for the tax clearance shall be the responsibility of the Contractor, and must be submitted directly to the DOTAX or IRS and not to the County.

**3.5 Hawaii Business Requirement.** (a) The Contractor shall comply with either §103D-310 (c) (1) or §103D-310(c)(2), HRS, as follows:

(1) §103D-310(c)(1), HRS, Hawaii business. A business entity meeting the requirement of §103D-310(c)(1), HRS, referred to as a "Hawaii business", is incorporated or organized under the laws of the State of Hawaii. As evidence of compliance, the Contractor shall submit a "Certificate of Good Standing" issued by the Department of Commerce and Consumer Affairs Business Registration Division (BREG). A Hawaii business that is a sole proprietorship, however, is not required to register with the BREG, and therefore not required to submit the certificate. A Contractor's status as a sole proprietor and its business street address indicated in Contractor's bid will be used to confirm that the Contractor is a Hawaii business.

(2) §103D-310(c)(2), HRS, Compliant non-Hawaii business. A business entity meeting the requirement of §103D-310(c)(2), HRS, referred to as a "compliant non-Hawaii business," is not incorporated or organized under the laws of the State of Hawaii but is registered to do business in the State as a separate branch or division capable of fully performing under the contract. As evidence of compliance, the Contractor shall submit a "Certificate of Good Standing" issued by the BREG.

(b) The above certificates shall be current within six (6) months of issuance date and submitted to the County prior to award of contract. If a valid certificate is not submitted on a timely basis for award of a contract, a bid otherwise responsive and responsible may not receive the award. The application for the above certificates shall be the responsibility of the Contractor, and must be submitted directly to the BREG and not to the County.

**3.6 Department of Labor and Industrial Relations (DLIR) requirement.** (a) The Contractor shall submit a certificate of

compliance (DLIR form LIR #27), issued by the DLIR stating the Contractor complies with chapters 383, 386, 392 and 393 of the Hawaii Revised Statutes.

(b) The above certificate shall be current within six (6) months of issuance date and submitted to the County prior to award of contract. If a valid certificate is not submitted on a timely basis for award of a contract, a bid otherwise responsive and responsible may not receive the award. The application for the above certificates shall be the responsibility of the Contractor, and must be submitted directly to the DLIR and not to the County.

**3.7 Contract Not Binding Unless Properly Executed and Appropriation Available.** The contract shall not be binding or of any force until said contract has been fully and properly signed by all of the Parties thereto and approved by the Procurement Officer as to availability of funds in the amount and for the purpose set forth therein. The Contractor's execution of the contract shall be considered verification that the Contractor has reviewed, understands, accepts, and agrees to abide by the terms and conditions contained in the bid documents, the proposal submitted by the Contractor, the proposed contract, and the performance and payment bonds.

**3.8 Forfeiture of Bid Security.** Failure to execute the contract and furnish sufficient performance and payment bonds shall be cause for the cancellation of award to the Contractor. The Contractor also forfeits the bid security which becomes the property of the County, which is not a penalty, but liquidated damages sustained by the County. The County may make award to the next lowest responsive, responsible bidder or the County may re-advertise the work contemplated.

#### **Section 4 - Legal Relations and Responsibility**

**4.1 Independent Contractor.** The Contractor shall perform the contract as an independent contractor and shall not be entitled to any benefits and privileges of an employee of the County of Maui for purposes including, but not limited to, the County's civil service system, fringe benefits, unemployment benefits, worker's compensation benefits, federal and state taxes, social security tax, medicare tax, FICA tax and any other employment taxes. Upon execution of the contract, the Contractor shall comply with chapter 237 (general excise tax); chapter 383 (employment security); chapter 386 (workers' compensation); chapter 392 (temporary disability insurance); and chapter 393 (pre-paid health care), HRS. The Contractor and Contractor's sureties shall be liable for any loss caused to the County by reason of the Contractor's failure to comply with chapter 386,



HRS.

**4.2 Contractor's Inability to Contract for County.**

Notwithstanding anything herein contained to the contrary, Contractor shall not have the right to make any contracts or commitments for, or on behalf of, the County without first obtaining written consent of the County.

**4.3 Insurance.** (a) The Contractor shall submit to the Officer-in-Charge within ten (10) calendar days after execution of the contract, or within such further time as the County may allow, three (3) copies of insurance certification evidencing that the Contractor has in force the following types of insurance with the following minimum limits of liability:

(1) HRS chapters 383 (Unemployment Insurance), 386 (Workers' Compensation), 392 (Temporary Disability Insurance), and 393 (Prepaid Health Care) requirements for award. The Contractor shall submit an approved certificate of compliance issued by the Hawaii State Department of Labor and Industrial Relations (DLIR). The certificate shall be valid for six (6) months from the date of issue and must be valid on the date it is received by the County. The application for the certificate shall be the responsibility of the Contractor, and must be submitted directly to the DLIR and not to the County. [§103D-310(c), HRS]

(2) Employers' Liability Insurance. The Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require the Contractor's sub-contractors (if any) at their own expense to procure and maintain in full force at all times during the term of this Agreement, employers' Liability insurance with minimum limits for bodily injury from accident of FIVE HUNDRED THOUSAND DOLLARS (\$500,000), or such other limit acceptable to the County, - each accident; for bodily injury from disease of FIVE HUNDRED THOUSAND DOLLARS (\$500,000), or such other limit acceptable to the County, - each employee; and for bodily injury from disease of FIVE HUNDRED THOUSAND DOLLARS (\$500,000), or such other limit acceptable to the County, - each policy limit.

(3) Commercial General Liability Insurance. The Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require the Contractor's sub-contractors (if any) at their own expense to procure and maintain in full force at all times during the terms of this Agreement, Commercial General Liability insurance with a bodily injury

and property damage combined single limit of liability of at least ONE MILLION DOLLARS (\$1,000,000), or such other limit acceptable to the County, for any occurrence. Such insurance shall include coverage in like amount for products/completed operations, contractual liability, and personal and advertising injury. "Claims made" policies are not acceptable under this section.

(4) Automobile Liability Insurance. The Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require the Contractor's sub-contractors (if any) at their own expense to procure and maintain in full effect at all times during the term of this Agreement, Automobile Liability insurance with a bodily injury and property damage combined single limit of at least ONE MILLION DOLLARS (\$1,000,000), or such other limit acceptable to the County, per accident.

(5) Fire and Standard Extended Coverage Insurance. Except for contracts in which the scope of work is limited to roadway construction or utility improvements that do not include payment for stored materials on-site, the Contractor shall insure the work for one million dollars (\$1,000,000), or such other limit acceptable to the County, plus one hundred percent (100%) of the replaceable value thereof for the life of the contract against all loss or damage by fire at the site and against all loss or damage covered by the Standard Extended Coverage Insurance endorsement, including vandalism and malicious mischief, by an insurance company or companies acceptable to the County. The amount of insurance may vary with the extent of the work complete, but shall at all times be at least equal to one million dollars (\$1,000,000), or such other limit acceptable to the County, plus the replaceable value of the amount paid for the work and materials installed and delivered, plus the replaceable value of the work or materials furnished or delivered by the Contractor but not yet paid for by the County. The insurance policy or policies shall be held jointly in the name of the County, the Contractor, and the Contractor's subcontractors as their interest may appear. The Contractor shall submit to the County satisfactory proof of the amount of such insurance carried with each application for partial payment.

(6) County as Additional Insured. Insurance policies providing the insurance coverage required in this section (except for Workers' Compensation) shall name the County, its agents, and its employees as additional insured for any claims arising from the Contractor's activities under this Agreement. Coverage must be primary in respect to the

additional insured. Any other insurance carried by the County shall be excess only and not contribute with this insurance. Such policies or certificates showing the above coverage shall be deposited with the County within ten (10) days of the execution of this Agreement and shall contain the following statement:

"Thirty (30) days' written notice of cancellation or change will be given to County of Maui, 200 South High Street, Wailuku, Hawaii 96793, before any cancellation or change of this policy will be effective. This insurance includes coverage for the liability assumed by the insured as Contractor under the Agreement between the insured and County of Maui, dated \_\_\_\_\_."

(b) When a subcontractor is utilized, the Contractor shall furnish or require the subcontractor to furnish the Procurement Officer within ten (10) calendar days after execution of the contract, or within such further time as the County may allow, with a copy of a policy or policies of insurance and certificate of insurance covering the subcontractor and the subcontractor's employees or agents in the same amount and for the same liability specified above.

(c) In the event of cancellation or termination of any policy required above or any substitute policy as provided for hereinafter, the Contractor or the subcontractor, as the case may be, shall immediately furnish the Procurement Officer with a substitute policy of insurance in the same amount and for the same liability specified above.

**4.4 Indemnification.** To the extent permitted by law, the Contractor shall defend, indemnify, and save the County and its officers and employees harmless from any and all deaths, injuries, losses and damages to persons or property, and any and all claims, demands, suits, action and liability therefor, caused by error, omissions or negligence in the performance of the contract by the Contractor or Contractor's subcontractors, agents and employees. The Contractor's obligations under this section shall survive and shall continue to be binding upon Contractor notwithstanding the expiration, termination or surrender of the contract.

**4.5 Absence of Interest.** The Contractor covenants that it currently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under the contract. The Contractor further covenants that in the performance of the contract, no person having such interest shall be employed.

**4.6 Laws and Regulations.** (a) The Contractor shall keep fully informed of all applicable federal, state and county laws, ordinances, codes, rules and regulations, governmental general and development plans and all changes thereto including, but not limited to, the Americans with Disabilities Act, health and safety, labor, anti-discrimination and environmental laws and regulations, and the following:

- (1) Article I of Title 10, Maui County Code, 1980, as amended, relating to the Maui Traffic Code;
- (2) Title 12, Maui County Code, 1980, as amended, relating to Streets, Sidewalks, and Public Places;
- (3) Chapter 16.04A, Maui County Code, 1980, as amended, relating to the Fire Code;
- (4) Chapter 16.18A, Maui County Code, 1980, as amended, relating to the Electrical Code;
- (5) Chapter 16.20A, Maui County Code, 1980, as amended, relating to the Plumbing Code;
- (6) Chapters 103 and 103D, HRS, as amended, relating to Expenditure of Public Money and Public Contracts and the Hawaii Public Procurement Code;
- (7) Chapter 104, HRS, as amended, relating to Wages and Hours of Employees on Public Works;
- (8) Chapter 22 of Subtitle 4 of Title 12, HAR, relating to Wage Determinations and the Administration and Enforcement of chapter 104, HRS;
- (9) Chapter 132, HRS, as amended, relating to the Fire Protection;
- (10) Chapter 321, HRS, as amended, relating to the Department of Health;
- (11) Chapter 378, HRS, as amended, relating to Employment Practices;
- (12) Chapter 386, HRS, as amended, relating to Workers' Compensation Law;
- (13) Chapter 396, HRS, as amended, relating to Occupational Safety and Health;
- (14) Part III of Subtitle 8 of Title 12, HAR, relating to Construction Standards; and

(15) Chapters 120 to 132 of Subtitle 11 of Title 3, HAR, relating to the Hawaii Public Procurement Code.

(b) The Contractor shall comply with all such laws, ordinances, codes, rules, regulations, design standards and criteria, governmental general and development plans. If any discrepancy or inconsistency is discovered between the contract and any such law, ordinance, code, rule, regulation, design standard, design criterion, and governmental general and development plans, the Contractor shall immediately report the same in writing to the Officer-in-Charge.

(c) The Contractor shall obtain all necessary permits and approvals for the performance of the contract and shall pay for all charges in connection with such permits.

### **Section 5 - County Responsibility**

**5.1 Cooperation by the County.** The County, through the Officer-in-Charge, shall cooperate fully with the Contractor and will promptly place at the disposal of the Contractor all available pertinent information which the County may have in its possession. The Officer-in-Charge will certify to the accuracy of certain information in writing whenever it is possible to do so. The County does not represent that other information not certified as accurate is so and takes no responsibility therefor, and the Contractor shall rely on such information at the Contractor's own risk.

**5.2 Review by the County.** The Officer-in-Charge shall review all submissions and other work and data required to be made by the Contractor and reject or approve such submissions in their entirety or approve the same subject to such deletions, additions and revisions as the County may deem necessary and proper. For submissions specified in the special provisions, all items not required by the County to be deleted, added or revised after review by the Officer-in-Charge and not defective by reason or error, omissions or negligence on the part of the Contractor, subcontractors, agents or employers shall be deemed to have been approved.

**5.3 Limitation of Liability.** The County shall be responsible for damage or injury caused by the County's agents, officers, and employees in the course of their employment to the extent that the County's liability for such damage or injury has been determined by a court or otherwise agreed to by the County, and the County shall pay for such damage or injury to the extent permitted by law and approved by the Maui County Council. The County's total liability under the contract, if any, is strictly limited to the provisions in this paragraph.

## **Section 6 - Performance of Contract.**

**6.1 Time.** (a) Time is of the essence herein. Performance of the services under the contract shall commence on the commencement date designated in the Notice to Proceed and the services described herein shall be completed within the time specified.

(b) If the Contractor cannot complete the contract within the time specified due to reasons beyond its control, a written request for a time extension accompanied by a detailed accounting of the causes and reasons for such delays may be submitted to the Officer-in-Charge for determination as to whether a time extension will be granted. The Officer-in-Charge's decision shall be final.

(c) If the scope of the work is amended during construction, an appropriate adjustment may be made to the contract time subject to approval by the Officer-in-Charge.

(d) Any adjustment to the contract time shall be made by contract amendment or change order.

**6.2 Preconstruction Meeting.** The County may schedule a pre-construction meeting after the execution of the contract.

**6.3 Construction Schedule.** (a) The Contractor shall submit to the Officer-in-Charge a detailed construction schedule in critical path method ("CPM") format, itemizing the various subdivisions of work and their durations at the pre-construction meeting, if held. If a pre-construction meeting is not held, the Contractor shall submit the schedule to the Officer-in-Charge not more than ten (10) calendar days after the Notice to Proceed is issued.

(b) The detailed construction schedule shall include: construction activities, the submission and approval of samples of materials and shop drawings, the procurement of materials and equipment, fabrication of materials and equipment and their delivery, installation, and testing, and start-up in CPM format.

(c) The Contractor shall revise the construction schedule whenever any delays are anticipated in any of the various items of work, or the performance of such items of work are obviously not in accordance with the construction schedule, and submit it to the Officer-in-Charge, together with the reasons for such anticipated or actual delays, and the planned courses of action to prevent or minimize any delay in the completion of the contract. Acceptance of the revised construction schedule and the reasons for such revisions shall not be construed to mean

concurrence or acceptance as a basis for any time extension by the Officer-in-Charge.

**6.4 Construction Progress.** (a) The Contractor shall furnish such manpower, materials, facilities and equipment as may be necessary to insure the prosecution and completion of the work in accordance with the accepted schedule. If work falls fourteen (14) days or more behind the accepted construction schedule, the Contractor agrees to take some or all of the following actions to return the project to the accepted schedule. These actions may include the following:

- (1) Increase manpower in quantities and crafts;
- (2) Increase the number of working hours per shift, shifts per working day, working days per week, or the amount of equipment, or any combination of the foregoing; and/or
- (3) Reschedule activities.

(b) Upon demand by the Officer-in-Charge, the Contractor shall prepare a proposed construction schedule revision demonstrating a plan to make up the lag in progress and insure completion of the work within the contract time. Upon receipt of an acceptable proposed schedule, the revision to the construction schedule shall be included a change order to the contract in accordance with section 8, Contract Amendments/Change Orders.

(c) All actions to return the project to the accepted schedule are at the Contractor's sole expense. The Contractor shall pay all costs incurred by the County which result from the Contractor's action to return the project to its accepted schedule. Contractor agrees that County shall deduct such charges from payments due the Contractor. It is further understood and agreed that none of the services performed by the Officer-in-Charge in monitoring, reviewing and reporting project status and progress shall relieve the Contractor of responsibility for planning and managing construction work in conformance with the construction schedule.

(d) When the Contractor foresees a delay in the prosecution of the work and, in any event, immediately upon the occurrence of a delay which the Contractor regards as unavoidable, the Contractor shall notify the Officer-in-Charge in writing of the probability of the occurrence of such delay, the extent of the delay, and its possible cause. The Contractor shall take immediate steps to prevent, if possible, the occurrence or continuance of the delay. If this cannot be done, the Officer-in-Charge shall determine how long the delay shall continue, to what extent the prosecution and completion of the work are being delayed thereby, and whether the delay is to be considered avoidable or unavoidable. The Officer-in-Charge shall notify the Contractor of the Officer-in-Charge's determination. The

Contractor agrees that no claim shall be made for delays which are not called to the attention of the Officer-in-Charge at the time of occurrence.

(e) In case the work is not completed in the time specified, including extension of time as may have been granted for unavoidable delays, the Contractor shall be assessed damages for those costs incurred by the County which are attributable to the fact that the work was not completed on schedule.

**6.5 Avoidable delays.** (a) Avoidable delays in the prosecution of the work shall include delays which could have been avoided by the exercise of care, prudence, foresight and diligence on the part of the Contractor or its subcontractors. Avoidable delays include:

(1) Delays which may in themselves be unavoidable but which affect only a portion of the work and do not necessarily prevent or delay the prosecution of other parts of the work nor the completion of the whole work within the contract time.

(2) Time associated with the reasonable interference of other contractors employed by the County which do not necessarily prevent the completion of the whole work within the contract time.

(b) The County may grant an extension of time for avoidable delay if deemed in the County's best interest. If the County grants an extension of time for avoidable delay, the Contractor agrees to pay actual costs, including charges for construction management, engineering and administration incurred during the extension, and other damages incurred by the County. Such time extension shall be included in the contract as a change order pursuant to section 8, Contract Amendments/Change Orders.

**6.6 Unavoidable delays.** (a) Unavoidable delays in the prosecution or completion of the work shall include delays which result from causes beyond the control of the Contractor and which could not have been avoided by the exercise of care, prudence, foresight and diligence on the part of the Contractor or its subcontractors. Delays in completion of the work of other contractors employed by the County will be considered unavoidable delays insofar as they interfere with the Contractor's completion of the work. Delays due to normal weather conditions shall not be regarded as unavoidable as the Contractor agrees to plan work with prudent allowances for interference by normal weather conditions. Delays caused by fire, unusual storms, floods, tidal waves, earthquakes, strikes, labor disputes, freight embargoes and shortages of materials shall be considered as unavoidable delays insofar as they prevent the Contractor from proceeding with at least seventy-five percent (75%) of the normal labor and equipment force for at least four (4) hours per day toward completion of



the current controlling item on the accepted critical path schedule.

(b) Should unavoidable delays prevent the work from beginning at the usual starting time, or prevent the Contractor from proceeding with seventy-five percent (75%) of the normal labor and equipment force for a period of at least four (4) hours per day, and the crew is dismissed as a result thereof, the Contractor will not be charged for a working day whether or not conditions change so that the major portion of the day could be considered to be suitable for work on the controlling item.

(c) For delays which the Contractor considers to be unavoidable, the Contractor shall submit to the Officer-in-Charge complete information demonstrating the effect of the delay on the critical path in the construction schedule. The submission shall be made within thirty (30) calendar days of the occurrence which is claimed to be responsible for the unavoidable delay. The Officer-in-Charge shall review the Contractor's submission and determine the number of days of unavoidable delay and the effect of such unavoidable delay on the critical path of the work. The County agrees to grant an extension of time, but no monetary compensation, to the extent that unavoidable delays affect the critical path in the construction schedule. During such extension of time, neither extra compensation or engineering inspection and administration nor damages for delay will be charged to the Contractor. It is understood and agreed by the Contractor and County that time extensions due to unavoidable delays will be granted only if such unavoidable delay involve critical activities which would prevent completion of the whole work within the specified contract time.

**6.7 Furnishing of Plans and Specifications.** The County will furnish the Contractor with up to six (6) sets of the plans and specifications at no cost to the Contractor. The Contractor shall be responsible for the cost of printing any additional plans and specifications.

**6.8 Breakdown of Lump Sum Items.** If the bid form calls for a total sum bid without bid items, or contains lump sum items, the Contractor shall submit a detailed cost breakdown of the total sum bid or such lump sum items not less than twenty (20) calendar days following issuance of Notice to Proceed.

**6.9 Commencement of Work.** The Contractor shall not commence with any work prior to the effective date of the Notice to Proceed.

**6.10 Prosecution of the Work.** The Contractor shall be available upon reasonable demand to discuss the progress of the services being performed under the contract. All questions

arising during the performance of the contract which must be resolved by the Procurement Officer or Officer-in-Charge shall be brought to their immediate attention by Contractor.

**6.11 Contractor to Report Errors or Discrepancies.** Should the Contractor discover any apparent inconsistencies within the contract documents, discrepancies between the contract documents and the conditions on the ground, or any error or omission in the contract documents or instructions, the Contractor shall immediately advise the Officer-in-Charge in writing thereof. If, after discovery, the Contractor elects to perform any work which may require revisions without authorization by the Officer-in-Charge, such work shall be performed solely at the Contractor's risk.

**6.12 Authority of the Procurement Officer and Officer-In-Charge.** Any question or dispute concerning any provision of the contract which may arise during its performance shall be decided by the Officer-in-Charge. The decisions of the Officer-in-Charge shall be final and binding upon all Parties unless the same is fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence, provided that decisions on questions or disputes relating to acceptance of the services performed under the contract, suspension or termination of the contract, extension of time, reduction or increase in the compensation of the Contractor and payment shall become final and binding upon all Parties only upon approval of the Procurement Officer, and provided further that nothing herein shall be construed as making final and binding any decision of the Officer-in-Charge and/or Procurement Officer on a question of law. Pending final decision of any dispute or question, the Contractor shall proceed diligently with the performance of services under the contract in accordance with the decision of the Officer-in-Charge and/or Procurement Officer.

**6.13 Subcontracting.** (a) The Contractor shall not subcontract any part of the contract except to those subcontractors specifically listed in the proposal submitted by the Contractor; provided that the Contractor may, for good cause, engage other subcontractors with the Officer-in-Charge's approval.

(b) Subcontractors and their employees shall be considered employees of the Contractor. Engaging subcontractors to perform any work shall not relieve the Contractor of its duty to complete the work in accordance with the contract.

(c) The Contractor shall replace any subcontractor for not performing in accordance with the contract when required and so notified by the Officer-in-Charge.

**6.14 Rate of Wages for Laborers and Mechanics.** (a) Every laborer and mechanic performing work on the job site for the construction of the work shall be paid no less than the prevailing wages provided that:

- (1) Prevailing wages shall be not less than the wages that the Director of Labor and Industrial Relations, shall have determined to be the prevailing wages for corresponding classes of laborers and mechanics on projects of similar character in the State;
- (2) The prevailing wages shall be not less than the wages payable under federal law to corresponding classes of laborers and mechanics employed on public works in the State that are prosecuted under contract or agreement with the government of the United States; and
- (3) Notwithstanding the provisions of the contract, the prevailing wages shall be periodically adjusted during the performance of the contract in an amount equal to the change in the prevailing wages as periodically determined by the Director of Labor and Industrial Relations.  
[§104-2(b), HRS]

(b) No laborer or mechanic employed on the job site of any public work of the County thereof shall be permitted or required to work on Saturday, Sunday, or a legal holiday of the State or in excess of eight hours on any other day unless the laborer or mechanic receives overtime compensation for all hours worked on Saturday, Sunday, and a legal holiday of the State or in excess of eight hours on any other day. For purposes of determining overtime compensation under this subsection, the basic hourly rate of any laborer or mechanic shall not be less than the basic hourly rate determined by the Director of Labor and Industrial Relations to be the prevailing basic hourly rate for corresponding classes of laborers and mechanics on projects of similar character in the State. [§104-2(c), HRS]

(c) The Contractor or the Contractor's subcontractors shall pay all mechanics and laborers employed on the job site, unconditionally and not less often than once a week, and without deduction or rebate on any account, except as allowed by law, the full amounts of their wages including overtime, accrued to not more than five (5) working days prior to the time of payment, at wage rates not less than those deemed to be prevailing, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and the laborers and mechanics.

(d) The rates and wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the job site, and a copy of the rates of wages required to be posted shall be given to each laborer and mechanic employed under the contract by the Contractor at the time each laborer and mechanic is employed, except that where there is a collective bargaining agreement the Contractor does not have to provide the Contractor's employees the wage rate schedules. [§104-2(d), HRS]

(e) The Contractor shall be solely responsible for any increase in rates and wages during the contract.

(f) The County may withhold from the Contractor so much of the accrued payments as the County may consider necessary to pay to the laborers and mechanics employed by the Contractor or any subcontractor on the job site the difference between the prevailing wages and the wages received and not refunded by the laborers and mechanics. [§104-2(e), HRS]

**6.15 Payrolls and Payroll Records.** (a) A certified copy of all payrolls shall be submitted weekly to the Officer-in-charge for review. The Contractor shall be responsible for the submission of certified copies of the payrolls of all subcontractors. The certification shall affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the prevailing wages and the classifications set forth for each laborer or mechanic conform with the work the laborer or mechanic performed. Any certification discrepancy found by the County shall be reported to the Contractor and Director of Labor and Industrial Relations. [§104-3(a), HRS]

(b) Payroll records for all laborers and mechanics working at the site of the work shall be maintained by the Contractor and the Contractor's subcontractors during the course of the work and preserved for a period of three (3) years thereafter. The records shall contain the name of each employee, the employees' correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. [§104-3(b), HRS]

(c) The Contractor shall make payroll records available for examination within ten (10) calendar days from the date of the written request by the County, Director of Labor and Industrial Relations of the State, or any authorized representatives thereof. Any Contractor who:

- (1) Fails to make payroll records accessible within ten (10) calendar days;
- (2) Fails to provide information requested for the

proper enforcement of chapter 104-3, HRS, within ten (10) calendar days; or

- (3) Fails to keep or falsifies any record required under chapter 104-3, HRS,

shall be assessed a penalty as set forth in section 104-22(b), HRS. [§104-3(c), HRS]

**6.16 Prompt Payment By Contractor to Subcontractors and Vendors.** (a) Any money, other than compensation retained, paid to the Contractor shall be dispersed to subcontractors and vendors within ten (10) calendar days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor met all the terms and conditions of the subcontract and there are no bona fide disputes on which the County has withheld payment. [ §103-10.5(a), HRS]

(b) Upon final payment to the Contractor, full payment to the subcontractor, including compensation retained, shall be made within ten (10) calendar days after receipt of money, provided that there are no bona fide disputes over the subcontractor's performance under the subcontract. [§103-10.5(b), HRS]

(c) Where a subcontractor has provided evidence to the Contractor of:

- (1) A valid union trust fund contribution bond acceptable to the Contractor in an amount not less than three (3) months of the subcontractor's trust fund contribution;
- (2) A performance and payment bond for the work under the contract executed by a surety company authorized to do business in the State of Hawaii;
- (3) Any other bond acceptable to the Contractor; or
- (4) Any other form of mutually-acceptable collateral;

and the Contractor fails to pay in accordance with this subsection, a penalty of one and one-half percent (1.5%) per month shall be imposed on the outstanding amounts due to the subcontractor. The penalty may be withheld by the County from future payment due to the Contractor. Where a Contractor has violated requirements set forth in sub-paragraph (b) three (3) or more times within two (2) years of the first violation, the Contractor shall be referred to the Contractor License Board by the County for action under section 444-17(14), HRS. [§103-10.5(c), HRS]

**6.17 Termination of Work on Failure to Pay Agreed Wages.**

If the County finds that any laborer or mechanic employed on the job site by the Contractor or any subcontractor has been or is being paid wages at a rate less than the required rate by the contract or specifications, or has not received the laborer's or mechanic's full overtime compensation, the County may, by written notice to the Contractor, terminate the Contractor's right, or the right of any subcontractor, to proceed with the work or with the part of the work in which the required wages or overtime compensation have not been paid and may complete such work or part by contract or otherwise, and the Contractor and the Contractor's sureties shall be liable to the County for any excess costs occasioned thereby. [§104-4, HRS]

**6.18 Vehicular and Pedestrian Traffic, Public Convenience, and Safety.** (a) If the project requires the closing or obstruction of any public thoroughfare, the Contractor shall comply with the Manual on Uniform Traffic Control Devices, U. S. Department of Transportation, Federal Highway Administration, and the Maui Traffic Code of the Maui County Codes, 1980, as amended.

(b) No pedestrian or vehicular traffic within public rights of way shall be altered without authorization from the Hawaii State Department of Transportation, Department of Public Works and Environmental Management, Police Department, and Department of Fire and Public Safety.

(c) The Contractor shall minimize, to the extent possible, hazardous conditions; shall provide additional safety devices as deemed prudent; shall maintain all signs, signals, lighting devices, markings, and barricades provided to minimize public inconvenience; and shall exercise safety practices during all hours of the day for as long as such hazardous conditions exist. The Contractor shall prudently extend applicable provision of this subsection to areas, other than streets and highways, which involve the project.

(d) The presence of inspectors on the project or their oversight to discover or to point out any noncompliance on the part of the Contractor shall not relieve the Contractor from its responsibility under this subsection.

**6.19 Work on Weekends and Holidays, Night Work, and Overtime Work.** (a) No work, except for resolution of an emergency event, shall be performed on Saturdays, Sundays, or State/County recognized legal holidays, unless authorized by the Officer-in-Charge.

(b) No work shall be performed between sunset and sunrise, unless required by the contract documents or authorized by the

Officer-in-Charge.

(c) No work in excess of eight (8) hours per day or in excess of forty (40) hours per week shall be performed unless authorized by the Officer-in-Charge.

(d) The Contractor shall be responsible for costs incurred by the County under paragraphs (a), (b), and (c).

**6.20 Value Engineering.** (a) Except with specific approval from the Officer-in-Charge, this subsection shall be applicable only if the contract price is in excess of \$100,000 and will result in a net savings in the project of at least \$1,000.

(b) Any cost reduction proposal intended to be considered as a value engineering change proposal (VECP) shall be so identified as a value engineering change proposal and submitted to the Officer-in-Charge.

(c) In order that any proposal be accepted as a VECP, it must result in a net cost savings to the County by providing a system, structure, procedure or process better than the design specified or by providing less costly items than those specified in the contract documents without impairing any of their essential functions and characteristics such as service life, reliability, economy of operation, ease of maintenance, and necessary standardized features. [§103-49, HRS]

(d) With the submission of any VECP, the Contractor shall submit the following information:

- (1) A description of the difference between the existing contract requirements and the VECP, and the comparative advantages and disadvantages of each;
- (2) An itemization of the requirements of the contract which must be changed if the VECP is accepted and recommendations as to how each change should be made;
- (3) An estimate of the reduction in construction costs or the net cost savings to the County that would result from acceptance of the VECP, taking into account the costs of implementation by the Contractor, including costs attributable to subcontractors, and the basis of the estimate;
- (4) A prediction of effects the VECP would have on other costs to the County, such as County-furnished property costs, costs of related

items, and costs of maintenance and operations;

- (5) A statement of the time by which a change order accepting the VECP should be issued to obtain the maximum cost reduction during the remainder of the contract period, noting any effect on the contract period; and
- (6) The dates of any previous submissions of the value engineering change proposals, the number of any governmental contracts under which submitted and the previous actions by the various branches of government.

(e) The submission of any VECP by the Contractor and the receipt thereof by the Officer-in-Charge, or verbal acceptance of any VECP by any employee, assign, or agent of the County shall not obligate the County to accept or approve any such proposal. The Contractor shall comply with the provisions of the contract until such time that a VECP is approved.

(f) The County may accept in whole or in part any VECP. Its decision in the acceptance of any VECP is final. The County will approve value engineering change proposals by issuing change orders.

(g) The Contractor may restrict the County's right to use any sheet of a value engineering change proposal or of the supporting data in accordance with the terms of the following legend if it is marked as follows on such the sheet:

"This data furnished pursuant to a value engineering incentive clause shall not be duplicated, used, or disclosed, in whole or in part, for any purpose other than to evaluate a value engineering change proposal submitted under said clause. This restriction does not limit the County's right to use information contained in this data if it is or has been obtained from another source, or is otherwise available, without limitations. If after use of the data in evaluating a value engineering change proposal, the County accepts the proposal by issuing a change order, the County shall have the right to duplicate, use, and disclose any data pertinent to the proposal as accepted, in any manner and for any purpose whatsoever, and authorize others to do likewise."

(h) If the VECP is approved, the Contractor grants to the County all rights to use, duplicate or disclose in whole or part, in any manner and for any purpose, and to have or permit others to do likewise, any data reasonably necessary to fully utilize such a proposal. Contract modifications made as a result of this clause will state that they are made pursuant to



it.

(i) If a VECP is accepted, affected portions of the construction plans and specifications shall be modified by change order.

(j) An equitable adjustment shall be made in the contract price so that the Contractor will share a portion of the realized cost reduction.

(k) If a VECP is accepted, an adjustment shall be made to the contract time, as required.

(l) Previously accepted or previously submitted but not accepted value engineering change proposals under other contracts, or both, may be submitted for consideration; provided that previously accepted value engineering change proposals under other contracts shall not be grounds for automatic acceptance under the contract.

(m) The County may impose, as a condition of acceptance of any VECP, a requirement that the Contractor warrants the statements, claims, and other information contained in the VECP regarding essential functions and characteristics such as service life, reliability, economy of operation, ease of maintenance, and desired appearance, such warranty to be for an appropriate period to be determined by the County.

(n) The determination of the proposed VECP shall be at the County's sole discretion and the decision will be final.

(o) The County shall not be liable for costs or delays incurred by the Contractor regarding the County's determination with respect to a proposed VECP including development costs, anticipated profits, and increased material or labor costs. Non conforming work and the annulment of VECP review shall not be the basis of claim against the County including claims for delay.

**6.21 Plans to Be Furnished by the Contractor.** (a) Working or shop drawings shall be submitted only by the Contractor for approval by the Officer-in-Charge. Upon approval by the Officer-in-Charge, such drawings shall become part of the contract documents. The Contractor shall not proceed with work and shall not order any material, equipment, or device affected by such drawings, until such drawings are approved by the Officer-in-Charge.

(b) The Contractor shall submit six (6) copies of working or shop drawings and/or catalog cuts for fabricated items and manufactured items (including mechanical and electrical

equipment). Submission shall be made in sufficient time to allow the Officer-in-Charge not less than twenty-one (21) calendar days for examining submissions, unless such submissions are for major equipment that requires review by more than one engineering discipline, in which case the time period shall be increased to thirty (30) calendar days.

(c) Drawing size shall be (8.5" x 11"), (11" x 17"), or (24" x 36"). Drawings shall be accurate, distinct, and complete, and shall contain all required information, including satisfactory identification of items, units, and assemblies in relation to the contract drawings and specifications.

(d) The Contractor shall mark drawings by a signed stamp, or other approved means, indicating that the Contractor has checked the shop drawings, and that the work shown is in accordance with contract requirements and has been checked for dimensions and relationship with work of all other trades involved. The practice of submitting incomplete or unchecked drawings will not be acceptable and will be returned to the Contractor for re-submission in the proper form.

(e) After the Officer-in-Charge's review, two (2) sets of submissions will be returned to the Contractor appropriately stamped. If major changes or corrections are necessary, the drawings may be rejected and will be returned to the Contractor with one (1) set of the submissions indicating such changes or corrections, and the Contractor shall correct and resubmit six (6) revised copies. No changes shall be made by the Contractor to resubmitted shop drawings other than those changes indicated by the Officer-in-Charge.

(f) The Officer-in-Charge's review of shop and working drawings and catalog cuts shall not relieve the Contractor from responsibility for correctness of dimensions, fabrication details, and space requirements.

(g) Operation and maintenance data shall be assembled in three ring binders (Slant "D" style), which shall be indexed and tabbed. The Contractor shall provide six (6) copies of originals (not photocopies) of the operation and maintenance data to the Officer-in-Charge.

**6.22 Contract Documents to Be Kept on the Project Site.** The Contractor shall keep a copy of the contract documents at the project site, and in such a location where they shall be readily accessible for reference.

**6.23 Additional Plans to Be Furnished by the Officer-in-Charge.** The construction plans are intended to be fairly comprehensive and indicate in detail the scope of the work. If

during the progress of construction, the Contractor should request supplemental plans to clarify or define in greater detail the intent of the contract documents, the Officer-in-Charge may furnish such supplemental plans, and such additional plans shall become a part of the contract documents, and the Contractor shall perform the work in conformance with such supplemental plans.

**6.24 Personal Supervision.** (a) The Contractor shall either be personally present or have a responsible representative, authorized to act on behalf of the Contractor, at the project site at all times.

(b) The Contractor shall provide the Officer-in-Charge, in writing, with the name(s) of the Contractor's representative(s).

**6.25 Character of Workers, Methods, and Equipment.** (a) The Contractor shall employ persons who possess the skills required to perform the work under the contract.

(b) When required by the Officer-in-Charge, the Contractor shall replace any employee who lacks the skill to perform the work assigned to such employee, or is discourteous or disorderly while performing such work. A person who has been replaced may be assigned other work with the approval of the Officer-in-Charge.

(c) The Contractor shall use proper and efficient methods and equipment based upon standard construction industry practices for the performance of the contract.

**6.26 Lines and Grades.** (a) The laying out of base lines, establishment of grades and staking out the entire work shall be done by a surveyor or civil engineer licensed in the State of Hawaii at the expense of the Contractor, and the Contractor shall be solely responsible for their accuracy. The Contractor shall be responsible for costs of replacing the horizontal and vertical control points or monuments if disturbed or destroyed by the Contractor.

(b) Should any discrepancy be discovered in the dimensions given in the plans, the Contractor shall immediately notify the Officer-in-Charge before proceeding any further with the work, otherwise the Contractor will be held responsible for any costs involved in correction of construction placed due to such discrepancy.

**6.27 Contractor's Entry upon Private Properties.** Unless explicitly stated in the contract documents or informed in writing by the Officer-in-Charge, the Contractor is not authorized to enter any property other than the project site.

If the Contractor enters any property, whether authorized by the landowner or any other person claiming an interest in the property, or without any authorization, and causes property damage, personal injury, or wrongful death thereupon, the Contractor shall be responsible to settle any and all claims made by the landowner or person claiming an interest in the property.

**6.28 Existing Underground Improvements.** (a) Whenever the existence of drainage, gas, oil, sewer, or water pipelines (if applicable, see also Article 301.10 of the Water Systems Standards); cable TV, electric, or telephone lines, or other underground utility facilities are indicated in the construction plans, or are not indicated in the construction plans, but inquiries indicate their existence, the Contractor shall exercise utmost caution, keeping in mind the possible existence of unrecorded laterals and other incidental facilities, and protect all such improvements from damage. The Contractor shall be responsible for any and all damages to all such improvements resulting from its operations.

(b) The Contractor is not eligible for additional compensation and shall not make any claims against the County for extra effort required to prevent any damages or extra work caused or resulting from its operations under this subsection.

**6.29 Quality of Materials.** All materials furnished and installed shall be new, be of standard quality of their respective kinds, and be free of defects. Rejected materials must be removed from the project site immediately or within such time as allowed by the Officer-in-Charge and replaced with materials of the quality required by the contract documents. Failure by the Officer-in-Charge to reject materials or to require the removal of such rejected materials shall not relieve the Contractor from responsibility as to the quality and character of materials used on the project.

**6.30 Defective Work.** Any defective work which may be discovered before the completion of the work shall be corrected as soon as possible. The fact that the Officer-in-Charge may not be aware of defective work shall not constitute the acceptance of the same. Payment, whether partial or final, shall not be construed to be an acceptance of defective work or improper material.

**6.31 Inspectors.** (a) The Officer-in-Charge may place inspectors on the project. They shall have free access to inspect any and all portions of the project at all times and shall be afforded all means to inspect the materials furnished and work performed on the project. No defective or noncomplying

material or workmanship will be considered as accepted as a consequence of the failure of the inspectors to discover or to point out said defects or deficiencies during the construction; nor will the presence of inspectors on the project relieve the Contractor from responsibility for securing the quality and progress of work required by the contract documents.

(b) The inspectors may not alter or waive the provisions of the contract, issue instructions contrary to the contract, or act as foreman for the Contractor. The inspectors shall be free to perform their duties at all times and any intimidation of any inspector by the Contractor or the Contractor's agents or employees, shall be sufficient reason for the County to terminate the contract.

(c) If the Contractor wishes to work at such time of the day which is during the period other than the regular business hours of the County, or on a Saturday, Sunday, or legal State/County holiday, the Contractor shall submit a written request to the Officer-in-Charge for inspection services during such period not less than forty-eight (48) hours in advance of the time when such inspection services are required. If the Contractor's request is granted, the Contractor shall pay the County at the rate per hour designated by the County for each inspector provided. A deposit of legal tender or certified check in an amount estimated by the County to be the cost of be incurred by the County. The Contractor shall be refunded any unused portion of the deposit or be responsible for additional payment based on actual cost incurred by the County for the additional inspection. The County may reject the request for additional inspection services, and consequently deny the Contractor's request to work overtime if inspectors are not available during the period the Contractor is planning to work.

**6.32 Findings Confidential.** Any reports, information, or data which the County deems confidential and is given to or prepared or assembled by the Contractor under the contract shall not be made available to any individual or entity by the Contractor without the prior written approval of the Officer-in-Charge.

**6.33 Ownership Vested in County.** It is expressly understood that any and all equipment, materials, data, information, results and any other thing derived or obtained directly or indirectly as a result of the contract, including, but not limited to, equipment, materials, data, information, and results shall be the sole and exclusive property of the County and that the Contractor shall have no interest, right or title to or in any of the foregoing.

**6.34 Pollution.** In accordance with section 103D-411,

HRS, the Contractor shall control any pollution in accordance with applicable federal, state, and county regulations when pollution is encountered in the performance of the contract. The Contractor shall immediately notify the Officer-in-Charge if pollution is encountered in the performance of the contract.

**6.35 Best Efforts.** Contractor agrees that it will, at all times, faithfully, industriously, and to the best of Contractor's ability, experience and talents, perform all of the duties that may be required of Contractor pursuant to the express and implicit terms hereof to the reasonable satisfaction of the County, as determined by the Officer-in-Charge.

**6.36 Clean up.** Upon the completion of the work, the Contractor shall remove all temporary structures, surplus materials, rubbish, and obstructions. Should the Contractor fail to do so, the Officer-in-Charge may undertake the work and deduct the cost of performing such work from compensation due the Contractor.

**6.37 Responsibility of the Contractor Prior to Final Acceptance of the Work.** The Contractor shall be responsible for the work until final acceptance by the County. Use of any portion of the work which may be necessitated by tie-ins to existing and live water systems and which portion of the work must be kept live and use of other portions of the work other than water system improvements by the public, with or without permission by the County, shall not be construed as an acceptance of the work and shall not relieve the Contractor from its responsibility hereunder.

**6.38 Substantial Completion.** (a) The Contractor, on considering the work to be substantially complete and ready for its intended use, shall so notify the Officer-in-Charge in writing. The notification shall include an itemized list of remaining incomplete work. If the Officer-in-Charge determines that the work is not substantially complete, the Officer-in-Charge will so notify the Contractor in writing identifying the reasons for such a determination. If the Officer-in-Charge finds the work substantially complete, the Officer-in-Charge will meet with the Contractor to:

- (1) prepare a punch list of incomplete items of work;
- (2) define the division of responsibility between County and Contractor with respect to security, operation, maintenance, heat, utilities, insurance, and warranties; and
- (3) describe any other issues related to acceptance of the substantially completed work.

Upon reaching agreement with the Contractor, the Officer-in-Charge will write to the Contractor, certifying that the work is substantially complete, listing the items of incomplete work,

stating the date for completion of incomplete work, defining the division of responsibilities, and setting forth any other terms related to acceptance.

(b) Except for any portion(s) of work specified for early completion or required by the County for early possession, substantial completion will not occur for any work until the entire project is ready for possession and use. The acceptance notice will include a punch list of incomplete work items, set the date for their completion, describe the division of responsibility between the County and Contractor, and describe any other terms of acceptance. The Contractor shall acknowledge receipt of the acceptance notice in writing, indicating acceptance of all of its terms and provisions.

(c) Upon receipt of the Contractor's acknowledgment letter, the County shall take possession of the work or portion of the work and put it into its intended service. The date that the work or portion of the work is put into service will become the date of substantial completion. Unless otherwise specified, warranties will begin on the date of substantial completion.

(d) Subsequent to the substantial completion date, the County may exclude the Contractor from the work during such periods when construction activities might interfere with the operation of the project. The County, however, shall allow the Contractor reasonable access for completion or correction of incomplete punch list items.

(e) The County shall have sole discretion for determination of substantial completion and will notify the Contractor, in writing, that the work is accepted as substantially complete.

**6.39 Possession of Portions of the Project.** Should the Contractor fail to meet any date specified for substantial completion of the work or any portion of the work requiring early possession and use by the County, the County may, after a 10-day written notice to the Contractor, take over such portion or all of the work that is behind schedule. In such case, the Officer-in-Charge will prepare a punch list of incomplete work. The County may allow the Contractor reasonable access to the work at such times that the operation of the project will not be affected or the County may complete the work itself after giving the Contractor notice of the County's intention to do so. The cost of County's work will be charged to and deducted from amounts due to the Contractor. The substantial completion date will be established as the date when the County actually begins using the project or portion of the project for its intended purpose. Division of responsibilities between the County and Contractor, beginning of warranties, and any other issues relating to substantial completion shall be as specified in the

contract.

**6.40 Acceptance of the Project.** (a) Upon completion of the work, including portions of the work previously accepted as substantially complete, the Contractor shall so notify the Officer-in-Charge in writing. Upon receipt of the notification, the Officer-in-Charge will determine if the work conforms to the terms of the contract. If the Officer-in-Charge finds materials, equipment, or workmanship which do not meet the terms of the contract, the Officer-in-Charge shall prepare a punch list of such items and submit it to the Contractor. Following completion of the corrective work by the Contractor, the Contractor shall notify the Officer-in-Charge that the work has been completed in accordance with the contract. Final determination of the acceptability shall be made by the Officer-in-Charge. Upon acceptance of the project, the Officer-in-Charge shall immediately file a notice of completion. For portions of the project not previously accepted as substantially complete, the conditions of guarantee shall commence on the date that the Officer-in-Charge files a notice of completion.

(b) The final application for payment shall be accompanied by all required documentation called for in the contract including complete and legally effective releases or waivers of liens in a form acceptable to the County. Subject to prior approval of the County, the Contractor may submit in lieu of the lien releases and waivers: (1) receipts of releases in full; (2) an affidavit that the releases and receipts cover all labor, services, materials, and equipment for which a lien could be filed and that all payrolls, materials, and equipment bills and other indebtedness connected with the work for which the County or the County's property might in any way be responsible have been paid or otherwise satisfied; and (3) consent of the surety, if any, to final payment.

(c) If any subcontractor or supplier fails to furnish a release or receipt in full, Contractor may furnish a bond or other collateral satisfactory to the County to indemnify the County against any lien.

(d) If, after reviewing the Contractor's final application for payment including all documentation required, the Officer-in-Charge determines that the work is complete, the Officer-in-Charge will recommend that final payment, including all retainages, be made by the County. The final payment will be due and payable by the County within thirty (30) days after any legal notice periods have expired.

**6.41 Warranty.** (a) The Contractor and Contractor's sureties shall be responsible for the work for a period of one (1) year following final acceptance to be free from defects in



workmanship and materials. Product warranties, as applicable, beyond the one (1) year Contractor warranty shall be secured in the name of the County of Maui and furnished to the County prior to final payment request.

(b) The performance and payment bond shall remain in force during the Contractor's warranty period, or the Contractor may elect to withdraw the performance and payment bond and deposit a replacement bond in an amount not less than ten percent (10%) of the final contract price; provided that the Contractor and Contractor's sureties for the replacement bond shall be responsible for any and all costs which exceed the replacement bond amount during the warranty period.

(c) The Contractor and Contractor's sureties shall be responsible for the repair or replacement, or both, of all defective work or materials, and for any and all personal injuries and property damage, including wrongful death, resulting from any defective work or materials, and costs incurred by the County in connection with any defective work or materials.

(d) If the Contractor or Contractor's sureties fail to perform the responsibilities under this subsection in a timely manner, the Officer-in-Charge may undertake or cause the undertaking of such work, and the Contractor and Contractor's sureties shall be responsible for all costs thereunder.

(e) If the work or any portion thereof fails, and the Officer-in-Charge determines that the public's safety, health, or welfare is jeopardized, the Officer-in-Charge may, with or without notice to the Contractor or the Contractor's surety, undertake the repair or replacement work, and the Contractor and Contractor's sureties shall be responsible for all costs incurred by the County.

## **Section 7 - Compensation**

**7.1 Compensation.** The Contractor shall be paid the amount stated in the contract less any reduction in compensation and plus any increase in compensation pursuant to the contract change order and modification sections herein, as full compensation for the performance of the services under the contract.

**7.2 Compensation Retained.** (a) The County may retain a portion of the amount due under the contract to the Contractor to insure proper performance of the contract, provided that the sum withheld shall not exceed five percent (5%) of the amount due the Contractor and that after fifty percent (50%) of the

contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the Procurement Officer may continue to withhold as compensation retained sums not exceeding five percent (5%) of the amount due the Contractor; provided further that the compensation retained shall not include sums deducted and withheld separately as liquidated damages from moneys due or that may become due the Contractor under the contract. [§103-32.1(a), HRS]

(b) The retention amount withheld by the Contractor from its subcontractors shall be the same percentage of compensation retained as that of the Contractor, provided that the subcontractor has provided evidence to the Contractor of:

- (1) A valid performance and payment bond for the project that is acceptable to the Contractor and executed by a surety company authorized to do business in the State of Hawaii;
- (2) Any other bond acceptable to the Contractor; or
- (3) Any other form of collateral acceptable to the Contractor.

This subsection shall also apply to the subcontractors who subcontract work to other subcontractors. [§103-32.1(b), HRS]

(c) The County may enter into an agreement with the Contractor which will allow the Contractor to withdraw from time to time the whole or any portion of the sum retained under subparagraph (a) upon depositing with the County any general obligation bond of the State or its political subdivisions with a market value not less than the sum to be withdrawn; provided that the County may require that the total market value of such bond be greater than the sum to be withdrawn. [§103-32.2, HRS]

**7.3 Monthly Progress Payments.** (a) The County shall pay the Contractor monthly progress payments based on the actual quantities of work done and the actual quantities of materials delivered to and safely stored at a site approved by the County. The Contractor shall submit monthly progress payment request to the Officer-in-Charge no later than the fifth (5<sup>th</sup>) day of each month for work performed during the previous calendar month.

(b) Subject to the retainage provisions of subsection 7.2, Compensation Retained, the County shall pay the Contractor an amount equal to the value of the completed and installed portion of the work for which the Contractor certifies has not previously been paid. The County shall also pay the Contractor for seventy-five percent (75%) of the value of materials

furnished, delivered and stored in an approved manner, provided that:

- (1) A copy of the paid receipts for the stored materials must be submitted with the pay estimate;
- (2) Fire and Standard Extended Coverage Insurance is required if payment for stored materials is requested; and
- (3) Payment for perishable stored materials, such as live plants and similar materials, will not be allowed.

(c) The Officer-in-Charge may decline to process a progress payment request if the total value of the work done since last estimate is less than \$1,000.

(d) Monthly progress payments may be subject to compensation retained.

**7.4 Death or Disability of Contractor.** In the case of an individual Contractor, if the Contractor dies or becomes physically or mentally disabled, the Contractor or the Contractor's estate shall be compensated in the same proportion of the compensation under the contract as the services performed bear to the services to be performed under the contract.

**7.5 Campaign Contributions Prohibited.** It is understood and agreed by the Parties that no portion of the Contractor's compensation to be paid under the terms of the contract shall be used as a campaign contribution.

**7.6 Authority to Withhold Money Due or Payable.** The Procurement Officer may withhold such amounts from the money due or to become payable under the contract to the Contractor, or any assignee thereof, as may be necessary to protect the County against liability, to satisfy the obligations of the Contractor to the County, employees, subcontractors and material men who have performed labor or furnished material and equipment under the contract, or to satisfy any outstanding debts owed to the County by the Contractor and may make such payments from such amounts as may be necessary to discharge such obligations, satisfy County debts and protect the County.

**7.7 Final Payment - Final Acceptance.** (a) Final payment will be made only after the issuance of a notice of final approval and acceptance by the Officer-in-Charge advising the Contractor of the satisfactory fulfillment of the terms of the contract, provided that the Director of Finance has determined that the Contractor has fully satisfied all outstanding debts to the County. Acceptance by the Contractor of the final payment shall constitute payment in full for all services performed under the contract.

(b) Upon completion and acceptance of the work under the

contract, the County shall pay the Contractor the balance due after deducting previous payments and amounts to be retained or deducted according to the contract.

(c) The County shall not make final payment until the following is received:

- (1) Written consent of the Contractor's sureties on the Contractor's bonds;
- (2) Tax clearance certificate from the State Director of Taxation stating that all delinquent taxes levied or accrued against the Contractor have been paid. The tax clearance for final payment shall be an original certificate with a green certified copy stamp, not over two (2) months old, with box 3a of the application completed for a specific job number, and indicating tax clearances from the Hawaii State Department of Taxation and the Internal Revenue Service on Tax Clearance Application A-6;
- (3) An affidavit stating that payment due to all subcontractors and all persons, companies, corporations for labor, tools, materials, and equipment used in the prosecution of the work under the contract have been paid or have been satisfactorily secured; and
- (4) A "Certification of Compliance for Final Payment" (SPO Form-22).

## **Section 8 - Contract Amendments/Change Orders**

**8.1 Change Order.** The Procurement Officer, at any time, and without notice to any surety, in a signed writing designated or indicated to be a change order, may make changes in the work within the scope of the contract as may be found to be necessary or desirable. Such changes shall not invalidate the contract or release the sureties, and the Contractor shall perform the work as changed, as though it had been part of the original contract. Minor changes in the work may be directed by the Procurement Officer with no change in contract price or time of performance.

**8.2 Adjustments of Price or Time for Performance.** (a) If any change order increases or decreases the Contractor's cost of, or the time required for performance of any part of the work under the contract, whether or not changed by the order, an adjustment may be made and the contract modified in writing

accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of the contract. Failure of the Parties to agree to an adjustment shall not excuse the Contractor from proceeding with the contract as changed, provided that the County promptly and duly makes such provisional adjustments in payments or time for the direct costs of the work as changed as the County deems reasonable. The right of the Contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work, provided however, that it follows the notice requirements for disputes and claims established by the contract.

(b) If the bid contains unit price items, the Officer-in-Charge may increase or decrease the quantities of such items, or delete such items in their entirety. If quantities are increased, the Contractor shall perform such work at the unit price bids for such items. If quantities are decreased or such unit price items are deleted in their entirety, the deductions from the contract price shall be based on the unit price bids for such items.

(c) If the scope of work of any unit price item, other than a change in its quantity, is changed by the Officer-in-Charge, the Contractor shall perform such work at a revised unit price to be agreed upon by the Contractor and the County.

(d) If the bid calls for a total sum bid without bid items or calls for lump sum items, and the Officer-in-Charge makes any changes in the scope of work of the project or in any lump sum item, the Contractor shall perform such work at a price to be agreed upon by the Contractor and the County.

(e) If any lump sum item is deleted by the Officer-in-Charge, the deduction from the contract price shall be based on the lump sum bid price of the item.

(f) If the Contractor and the County cannot come to an agreement as provided in paragraphs (c) and (d), such work shall be performed under subsection 8.3 - Change Order Work by Force Account.

(g) An adjustment may be made to the contract time if any change under this subsection affects the contract time.

(h) If the Officer-in-Charge deletes any item, or decreases the quantity of any item in the bid, and the Contractor has already ordered materials involved in such deletions or decreases, the Contractor shall make every effort to return the materials if requested by the Officer-in-Charge. If the materials are returnable, the County shall pay the Contractor for costs incurred in returning the materials. If

the materials cannot be returned, the County shall purchase them from the Contractor at the actual cost to the Contractor plus reasonable overhead costs. Materials ordered prior to the issuance of the Notice to Proceed shall be the Contractor's responsibility and the County will not make payment for such materials.

(i) Extra work means the providing of materials and equipment and the performing of work not directly or by implication called for by the contract. Changes in measured quantity under a unit price contract or item shall not be considered extra work. If the County requires extra work the County may (1) do it itself, (2) employ others to do it, (3) direct the Contractor to perform the extra work at unit bid price or a combination of such items, (4) direct the Contractor to perform the extra work at a mutually agreed upon lump sum, or (5) direct the Contractor to perform the extra work on a time and expense basis.

(j) Prior to any extra work being performed by the Contractor, the Contractor and the County shall enter into a contract amendment or change order wherein the extra work to be performed by the Contractor shall be defined, the cost of the work to be performed shall be agreed upon, and any time extension to the contract for the performance of such work, if applicable, shall be agreed upon; or failing such agreement, the contract amendment or change order shall stipulate that the work shall be performed under subsection 8.3 - Change Order Work By Force Account.

(k) Changes in contract price resulting from extra work will be determined by a mutually agreed upon lump sum price. The Contractor's proposal for such changes shall include a detailed breakdown of labor and materials to be performed by the Contractor's forces and the forces of the Contractor's subcontractors or material suppliers, as may be required. The breakdown shall include labor surcharge and sales tax cost.

(l) If the change involves extra work to be performed entirely by the Contractor, compensation for such extra work shall be based on the direct costs as listed in the detailed proposal, plus a percent of direct costs not to exceed fifteen percent (15%) for overhead and profit, plus one percent (1%) of such direct costs for bonds. When the extra work involves subcontractors and material suppliers, compensation for such work shall be based on direct costs as listed by the subcontractors or material supplier plus a percent of direct costs not to exceed fifteen percent (15%) of such direct costs for the subcontractor's or supplier's overhead and profit. The Contractor may add five percent (5%) to the subcontractor or material supplier's compensation for overhead and profit, and one percent (1%) for bond (general contractor only). The above

allowances for overhead and profit and shall include full compensation for overhead, including superintendence, and additional overhead attributable to a time extension granted because of the contract amendment or change order. In no event shall overhead and profit exceed a total of twenty percent (20%) of direct costs.

(m) When the contract amendment or change order involves work omitted, the reduction of the contract price shall be based on the direct costs listed in the detailed proposal submitted by the Contractor. An additional reduction may be made of an amount which can be identified as reduced overhead costs attributable to the work omitted. No reduction will be made for profit originally attributable to the omitted work.

(n) Any change to the scope of work shall be formalized by a contract amendment or change order.

**8.3 Change Order Work by Force Account.** (a) Compensation for change work by force account (time and expenses basis) shall be an amount equal to the sum of the following items:

- (1) The cost to the Contractor of all material delivered for the change order work evidenced by bills or vouchers;
- (2) The cost of all labor including foremen, except general superintendence, necessary to incorporate the above material in the change work or to finish the change order if no material are required, to be determined from the Contractor's payrolls or by inspections performed by the inspectors, or both;
- (3) Ten percent (10%) of the amount from subparagraph (2), which shall be considered as covering the cost of superintendence, hand tools, and clerical work in connection with the change order work and the Contractor's overhead costs;
- (4) A rental charge for the use of all construction equipment approved by the Officer-in-Charge. The rental rates shall be agreed upon by the Contractor and the Officer-in-Charge, and may or may not, include the cost of fuel oil, gasoline, electric energy, lubricating oil, repairs, and maintenance. The Contractor shall submit a proposed schedule of equipment rental charges to the Officer-in-Charge for approval prior to entering into a change order. The cost of small tools shall not be included;

- (5) The cost of workers' compensation insurance and public liability premiums, unemployment tax, social security tax, or other taxes on the labor for sub-paragraph (2);
- (6) Fifteen percent (15%) of the sums of sub-paragraphs (1) through (4), which shall be considered as covering all other expenses and profit;
- (7) Where force account work is performed by a subcontractor, the Contractor may add five percent (5%) to the subcontractor's computed compensation to cover its overhead and profit, provided that overhead and profit shall be limited to a total of twenty percent (20%) of direct costs;
- (8) One percent (1%) of direct costs for paragraphs (1) through (7) for bonds. The addition for bond cost is applicable only to the Contractor's compensation; and
- (9) The cost of state excise tax on the sum of paragraphs (1) through (8).

(b) The performance of change order work on a force account basis shall be under the supervision of the Officer-in-Charge, and the Officer-in-Charge's decision shall be final. The method of performing such work, the equipment to be used, and the amount and character of labor to be employed shall meet with the approval of the Officer-in-Charge. The force account formula may also apply to deleted work.

(c) Whenever the Contractor is directed to perform extra work on a time and expense basis, the Contractor will maintain accurate records. Each day a record of labor, materials and equipment costs shall be submitted to the Officer-in-Charge for verification. These records shall reflect the actual and necessary expenses pertaining to the extra work and shall be available for audit. Audits conducted under this provision shall be in accordance with generally acceptable auditing standards and established procedures and guidelines of the reviewing or auditing agencies.

**8.4 Time Period for Claim.** Within thirty (30) days after receipt of a written change order under paragraph 7.1, unless such period is extended by the Procurement Officer in writing, the Contractor shall file a notice of intent to assert claim for an adjustment. The requirement for timely written notice cannot be waived and shall be a condition precedent to the assertion of



a claim.

**8.5 Claim Barred After Final Payment.** No claim by the Contractor for an adjustment hereunder shall be allowed if written notice is not given prior to final payment under the contract.

**8.6 Claims Not Barred.** In the absence of such a change order, nothing in this section shall restrict the Contractor's right to pursue a claim arising under the contract or for breach of contract.

### **Section 9 - Stop Work Orders**

**9.1 Suspension of Work.** The Procurement Officer may, by written order, suspend the performance of the work, either in whole or in part for periods as the Procurement Officer may deem necessary for any cause, including but not limited to:

(a) Weather or soil conditions considered unsuitable for prosecution of the work;

(b) Failure on the part of the Contractor to:

(1) Correct conditions unsafe for the general public or for the workers;

(2) Carry out orders given by the Procurement Officer;

(3) Perform the work in strict compliance with the provisions of the contract; or

(4) Provide adequate supervision on the job site.

(c) Whenever a redesign that may affect the work is deemed necessary by the Procurement Officer;

(d) Unacceptable noise or dust arising from the construction even if it does not violate any law or regulation; or

(e) The convenience of the County.

**9.2 Partial and Total Suspension.** Suspension of work on some but not all items of work shall be considered a "partial suspension". Suspension of work on all items shall be considered "total suspension". The period of suspension shall be computed from the date set out in the written order for work to cease until the date of the order for work to resume.

**9.3 Reimbursement to Contractor.** In the event that the Contractor is ordered by the Procurement Officer in writing as provided herein to suspend all work under the contract in accordance with paragraph (c), (d), or (e) of subsection 9.1, Suspension of Work, the Contractor may be reimbursed for actual

money expended towards the project during the period of suspension. No allowance will be made for anticipated profits.

**9.4 Cost Adjustment.** If the performance of all or part of the work is suspended for reasons beyond the control of the Contractor, an adjustment shall be made for any increase in the cost of performance of the contract (excluding profit) necessarily caused by such suspension, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension:

(a) To the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor; or

(b) For which an adjustment is provided for or excluded under any other provision of the contract.

**9.5 Claims For Adjustment.** Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the provisions on changes and claims for adjustment. Claims for compensation shall be filed in writing with the Procurement Officer within thirty (30) days after the date of the order to resume work or the claims will not be considered. Together with the claim, the Contractor shall submit substantiating documents covering the entire amount shown on the claim. The Procurement Officer shall take the claim under consideration, may make such investigations as are deemed necessary, and shall be the sole judge as to the equitable nature of the claim. The Procurement Officer's decision shall be final.

**9.6 No Adjustment.** No provision of this section shall entitle the Contractor to any adjustments for delays due to failure of surety, suspensions made at the request of the Contractor, any delay required under the contract, or suspensions, either partial or whole, made by the Procurement Officer under paragraph (b) of subsection 9.1, Suspension of Work.

## **Section 10 - Variations in Estimated Quantities**

**10.1 Variations Requiring Adjustments.** Where the estimated quantity of a pay item in the contract is an estimated quantity and where the actual quantity of such pay item varies by more than fifteen percent (15%) above or below the estimated quantity in the contract, an adjustment in the contract price shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred fifteen percent (115%) or below eighty five percent (85%) of the estimated quantity. If the

quantity variation is such as to cause an increase in the time necessary for completion, the Procurement Officer shall, upon receipt of a timely written request for an extension of time, prior to final payment of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the Procurement Officer the findings justify.

**10.2 Adjustment of Price.** Any adjustment in contract price shall be determined in accordance with section 11 - Price Adjustment.

### **Section 11 - Price Adjustment**

**11.1 Price Adjustment.** Any adjustment in contract price pursuant to a clause in the contract shall be made in one or more of the following ways:

(a) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(b) By unit prices specified in the contract or subsequently agreed upon;

(c) Whenever there is a variation in quantity for any work covered by any line item in breakdown costs provided by the Contractor pursuant to contractual pre-work submission requirements, by the Procurement Officer, at the Procurement Officer's discretion, adjusting the lump sum price proportionately;

(d) In such other manner as the Parties may mutually agree;

(e) At the sole option of the Procurement Officer, by the costs attributable to the event or situation covered by the change, plus appropriate profit or fee; or

(f) In the absence of agreement between the Parties, by a unilateral determination by the Procurement Officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the Procurement Officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.

**11.2 Determining the Cost or Credit.** In determining the cost or credit to the County resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office and field overhead) and profit combined, shall not exceed the percentages set forth below:

(a) For the Contractor, for any work performed by its own labor forces, fifteen per cent (15%) of the cost;

(b) For each subcontractor involved, for any work performed by its own forces, fifteen per cent (15%) of the cost; and

(c) For the Contractor or any subcontractor, for work performed by their subcontractors, five per cent (5%) of the amount due the performing subcontractor.

**11.3 Percentages for Fee and Overhead.** Not more than three (3) line item percentages for fee and overhead, not to exceed the maximum percentages shown above, will be allowed regardless of the number of tier subcontractors.

## **Section 12 - Differing Site Conditions**

**12.1 Notification.** The Contractor shall promptly, and before such conditions are disturbed, notify the Procurement Officer of:

(a) Subsurface or latent physical conditions at the site differing materially from those indicated in the contract; or

(b) Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

**12.2 Adjustments of Price or Time for Performance.** After receipt of the notice, the Procurement Officer shall promptly investigate the site, and if it is found that the conditions do materially so differ and cause an increase in the Contractor's cost of, or the time required for, performance of any part of the work under the contract, whether or not changed as a result of the conditions, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this section shall be determined in accordance with section 11 - Price Adjustment.

**12.3 Timeliness of Claim.** No claim of the Contractor under this section shall be allowed unless the Contractor has given the notice required in this section; provided, however, that the time prescribed therefore may be extended by the Procurement Officer in writing.

**12.4 No Claim After Final Payment.** No claim by the Contractor for an adjustment thereunder shall be allowed if asserted after final payment under the contract.

**12.5 Knowledge.** Nothing contained in this section shall be

grounds for an adjustment in compensation if the Contractor had actual knowledge of the existence of such conditions prior to the submission of bids.

### **Section 13 - Novation or Change of Name**

**13.1 No Assignment.** No County contract is transferable, or otherwise assignable, without the written consent of the Procurement Officer. A Contractor may assign monies receivable under a contract with written consent of the Procurement Officer.

**13.2 Recognition of a Successor in Interest; Assignment.** When in the best interest of the County, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the County shall agree that:

(a) The transferee assumes all of the transferor's obligations;

(b) The transferor remains liable for all obligations under the contract but waives all rights under the contract as against the County; and

(c) The transferor shall continue to furnish, and the transferee shall also furnish, all required bonds.

**13.3 Change of Name.** When a Contractor requests to change the name in which it holds a contract with the County, the Procurement Officer shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into a novation agreement with the requesting Contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

### **Section 14 - Claims Based on Oral Directives**

**14.1 Notice Required.** Any oral order, direction, instruction, interpretation, or determination from the Procurement Officer which, in the opinion of the Contractor, causes any change, can be considered as a change only if the Contractor gives the Procurement Officer written notice of its intent to treat the oral order, direction, instruction, interpretation, or determination as a change directive. The written notice must be delivered to the Procurement Officer before the Contractor acts in conformity with the oral order, direction, instruction, interpretation, or determination, but

not more than five (5) days after delivery of the oral order to the Contractor. The written notice shall state the date, circumstances, whether a time extension will be requested, and source of the order that the Contractor regards as a change. The written notice may not be waived and shall be a condition precedent to the filing of a claim by the Contractor. Unless the Contractor acts in accordance with this procedure, any oral order shall not be treated as a change and the Contractor waives any claim for an increase in the contract time or contract price related to the work.

**14.2 Change Order Issued.** Not more than five (5) working days after receipt of the written notice from the Contractor, the Procurement Officer shall issue a change order for the subject work if the Procurement Officer agrees that it constitutes a change. If no change order is issued in the time established, it shall be deemed a rejection of the Contractor's claim for a change. If the Contractor objects to the Procurement Officer's refusal to issue a change order, it shall file a written protest with the Procurement Officer within thirty (30) days after delivery to the Procurement Officer of the Contractor's written notice of its intention to treat the oral order as a change. In all cases the Contractor shall proceed with the work. The protest shall be determined as provided in section 18 - Remedies.

## **Section 15 - Default, Delay, and Time Extensions**

**15.1 Default.** If the Contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in the contract, or any extension thereof, fails to complete the work within such time, or commits any other substantial breach of the contract, and further fails within seven (7) days after receipt of written notice from the Procurement Officer to commence and continue correction of the refusal or failure with diligence and promptness, the Procurement Officer may, by written notice to the Contractor, declare the Contractor in breach and terminate the Contractor's right to proceed with the work or the part of the work as to which there has been delay or other breach of contract. In that event, the County may take over the work and perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, the Contractor and the Contractor's sureties shall be liable for any damage to the County resulting from the Contractor's refusal or failure to complete the work within the specified time.

**15.2 Liquidated Damages Upon Termination.** If fixed and agreed liquidated damages are provided in the contract, and if the County so terminates the Contractor's right to proceed, the resulting damage will consist of the liquidated damages for the time as may be required for final completion of the work.

**15.3 Liquidated Damages in Absence of Termination.** If fixed and agreed liquidated damages are provided in the contract, and if the County does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages accumulated until the work is completed or accepted.

**15.4 Time Extension.** The Contractor's right to proceed shall not be so terminated nor shall the Contractor be charged with resulting damage if:

(a) The delay in the completion of the work arises from causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity in either a sovereign or contractual capacity; acts of another Contractor in the performance of a contract with the County; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; unusually severe weather; delays of subcontractors due to causes similar to those set forth above; or shortage of materials; provided, however, that no extension of time will be granted for a delay caused by a shortage of materials, unless the Contractor furnishes to the procurement officer proof that the Contractor has diligently made every effort to obtain the materials from all known sources, and further proof that the inability to obtain the materials when originally planned did in fact cause a delay in final completion of the entire work which could not be compensated for by revising the sequence of the Contractor's operations; and

(b) The Contractor, within ten (10) days from the beginning of the delay (unless the Procurement Officer grants a further period of time before the date of final payment under the contract), notifies the Procurement Officer in writing of the causes of delay. The Procurement Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in the judgment of the Procurement Officer, the findings of fact justify such an extension.

**15.5 Additional Rights and Remedies.** The rights and remedies of the County provided in the contract are in addition to any other rights and remedies provided by law.

## **Section 16 - Termination for Convenience**

**16.1 Terminations.** The Procurement Officer may, when the

interests of the County so require, terminate the contract in whole or in part, for the convenience of the County. The Procurement Officer shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

**16.2 Contractor's Obligations.** The Contractor shall incur no further obligations in connection with the terminated work, and on the date set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the County's approval. The Procurement Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the County. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.

**16.3 Right to Construction and Goods.** The Procurement Officer may require the Contractor to transfer title and deliver to the County in the manner and to the extent directed by the Procurement Officer:

(a) Any completed constructions; and

(b) The partially completed construction, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "construction material") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of the contract. The Contractor shall protect and preserve property in the possession of the Contractor in which the County has an interest. If the Procurement Officer does not exercise this right, the Contractor shall use the Contractor's best efforts to sell the construction, goods, and construction materials in accordance with the standards of section 490:2-706, HRS. This in no way implies that the County has breached the contract by exercise of the termination for convenience clause.

**16.4 Compensation.** (a) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by sub-chapter 15, chapter 3-122, HAR, bearing on such claim. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the Contractor, if at all, an amount set in accordance with clause (2) of paragraph (c).



(b) The Procurement Officer and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the County, the proceeds of any sales of construction, goods, and construction materials under clause (3) of paragraph (c), and the contract price of the work not terminated.

(c) Absent complete agreement under paragraph (b), the Procurement Officer shall pay the Contractor the following amounts, provided payments under paragraph (b) shall not duplicate payments under this paragraph, for the total (without duplication of any items) of:

(1) The cost of all contract work performed prior to the effective date of the notice of termination plus a five per cent (5%) markup on actual direct costs on the portion of the work (the markup shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of the work; provided, however, that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(2) Subject to the prior approval of the Procurement Officer, the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the "Contractor's obligations" provisions of the contract. Subcontractors shall be entitled to a markup of no more than ten per cent (10%) on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with clause (1);

(3) The total sum to be paid the Contractor under this paragraph shall not exceed the total contract price reduced by the amount of any sales of construction, goods, and construction materials under subsection 16.3, Right to Construction and Goods, and the contract price of work not terminated.

(d) Cost claimed, agreed to, or established under paragraphs (b) and (c) shall be in accordance with chapter 3-123, HAR.

## **Section 17 - Remedies**

**17.1 General.** Any dispute arising under or out of the contract is subject to chapter 3-126, HAR.

**17.2 Disputes.** (a) All controversies between the County and the Contractor which arise under, or are by virtue of, the Contract and which are not resolved by mutual agreement shall be decided by the Procurement Officer in writing, within ninety calendar days after a written request by the Contractor for a final decision concerning the controversy; provided that if the Procurement Officer does not issue a written decision within ninety calendar days after written request for a final decision, or within such longer period as may be agreed upon by the Parties, then the Contractor may proceed as if an adverse decision had been received.

(b) The Procurement Officer shall immediately furnish a copy of the decision to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(c) Any such decision shall be final and conclusive, unless fraudulent, or unless the Contractor brings an action seeking judicial review of the decision in the Circuit Court of the Second Circuit, State of Hawaii, County of Maui, within the six months from the date of receipt of the decision.

(d) The Contractor shall comply with any decision of the Procurement Officer and proceed diligently with performance of the contract pending final resolution by the Circuit Court of the Second Circuit, State of Hawaii, County of Maui, of any controversy arising under, or by virtue of, the contract, except where there has been a material breach of contract by the County; provided that in any event the Contractor shall proceed diligently with the performance of the contract where the Procurement Officer has made a written determination that work under the contract is essential to the public health and safety.

## **Section 18 - Miscellaneous Provisions**

**18.1 Severability.** If any provision of the contract is held invalid, the other provisions of the contract shall not be affected thereby. If the application of the contract or any of its provisions as to any person or circumstance is held invalid, the application of the contract and its provisions as to other persons or circumstances shall not be affected thereby.

**18.2 Entire Agreement.** The contract contains the complete agreement concerning the subject arrangement between the Parties and shall, as of the effective date hereof, supersede all other agreements between the Parties. The Parties stipulate that neither has made any representations with respect to the subject matter, execution and delivery of the contract except as such representations are specifically set forth herein. Each party acknowledges that the party has relied on the party's own

judgment in entering into the contract. The Parties further acknowledge that any payments or representations that may have previously been made by either of them to the other are of no effect and that neither has relied thereon in connection with its dealing with the other.

**18.3 Notices.** (a) Any written notice required to be given by a party to the contract shall be:

(1) delivered personally to the Contractor's designated representative on the project site, or

(2) sent by United States first class mail, postage prepaid to the party's address listed in the contract.

(b) A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. The Contractor shall notify the County in writing of any change of address. The Contractor shall maintain a post office address within the County of Maui and file the same with the Officer-in-Charge prior to or with the execution of the contract. All notices addressed in compliance with the directions of the Contractor and properly mailed shall be effective when mailed, or delivered by any of the above methods.

**18.4 Assistance of Legal Counsel.** The Parties have carefully read and fully understand all of the provisions and effects of the contract. The Parties shall consult with their respective counsel if any provision of the contract is not fully understood. The Parties are voluntarily entering into the contract and neither Party has made representations concerning the terms or effects of the contract other than those contained herein.

**18.5 Applicable Law and Venue.** The contract shall be governed by the laws of the State of Hawaii. Any action or court proceeding which may arise from the contract shall be heard in the Circuit Court of the Second Circuit, State of Hawaii, County of Maui.

[END OF GENERAL TERMS AND CONDITIONS]